

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 55.

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THE SOUTHWESTERN BREWERY AND ICE COMPANY,  
DON J. BARKIN, HENRY LOEB, AND OTTO  
MANN, PLAINTIFFS IN ERROR,

vs.  
JOSEPH SCHMIDT.

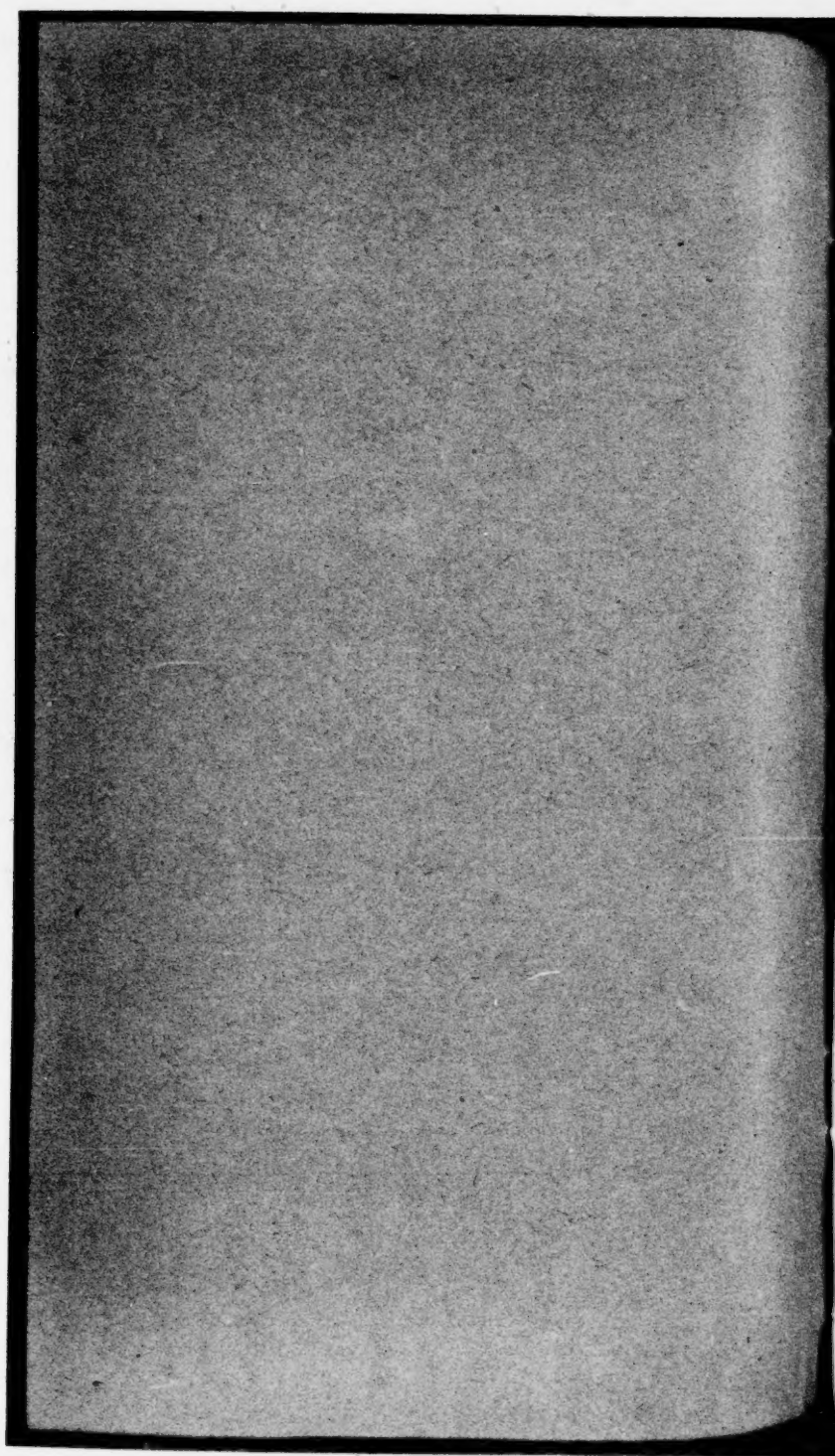
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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF  
NEW MEXICO.

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FILED MAY 16, 1913.

(22,169)





(22,168)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 282.

THE SOUTHWESTERN BREWERY AND ICE COMPANY,  
DON J. RANKIN, HENRY LOEBS, AND OTTO DIECK-  
MANN, PLAINTIFFS IN ERROR,

vs.

JOSEPH SCHMIDT.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF  
NEW MEXICO.

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*a* Be it remembered, That heretofore, on towit:—on the twenty-fifth day of April, A D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a transcript of record in a certain cause therein docketed as No. 1230 wherein The Southwestern Brewery and Ice Company was appellant and Joseph Schmitt was appellee, which said transcript of record, was and is in the following words and figures *following* to wit:—

1 In the Supreme Court of the Territory of New Mexico, —  
Term, A. D. —.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

THE SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

Be it remembered, that heretofore, on to-wit, the 18th day of August, 1906, there was filed in the office of the Clerk of the District Court of the Second Judicial District, Territory of New Mexico, within and for the County of Bernalillo, a Bill of Complaint in a certain cause, lately pending in said county, wherein Joseph Schmitt was plaintiff and The Southwestern Brewery & Ice Company was defendant, which said Bill of Complaint was in words and figures, to-wit:

2

Territory of New Mexico, Bernalillo District Court.

JOSEPH SCHMITT, Plaintiff,

vs.

THE SOUTHWESTERN BREWERY & ICE COMPANY.

*Complaint.*

The plaintiff, a resident of Albuquerque, in the County of Bernalillo and Territory of New Mexico complains of the Southwestern Brewery & Ice Company, a corporation, created, organized and existing under the laws of the Territory of New Mexico, and having its principal office and place of business at Albuquerque aforesaid, and alleges:

# I.

That on the second day of January, 1906, the defendant was, and for a long time prior thereto had been engaged in the business of conducting and carrying on a brewery for the manufacture of beer, at Albuquerque in the County of Bernalillo and Territory of New Mexico, and the plaintiff was on the said second day of January, 1906, and for a long time prior thereto had been employed



by the defendant as its servant in the capacity of a brewer, and plaintiff alleges that it was a part of the duty of the said plaintiff in his said employment to cook the mash in a certain cooker, then and there owned by the said defendant, and used by it in its said business, and it became and was the duty of the said defendant

3 to use reasonable care to furnish and provide to the said plaintiff a suitable and safe place in which to do his work, and suitable and safe appliances wherewith to do the same. And plaintiff further alleges that on the said second day of January, 1906, the said defendant did furnish and provide for the use of the said plaintiff a certain cooker, which was so out of repair and so insufficient for the purpose for which it was required to use the same, that the plaintiff was unwilling to use it on the day aforesaid, but the said defendant requested the said plaintiff to use the said cooker until material which had been ordered for the repair of said cooker should arrive, and promised the said plaintiff to repair the said cooker in a very short time, and thereupon the said plaintiff, upon request of the said defendant, and relying upon the said promise, consented to use the said defective and insufficient cooker on the said second day of January, 1906. While the said plaintiff was on said second day of January, 1906, so using the same in the due course of his employment and was exercising due care for his safety, the said cooker, which was filled with boiling mash, gave way and became leaky and ceased to retain its contents, as a safe and sufficient cooker would and should have done, so that a large part of the boiling contents of the said cooker was precipitated upon the said plaintiff, and the said plaintiff was thereby burned and scalded and rendered unconscious, and this plaintiff was so burned in and upon his head, face, hands and body that his life was despaired of and the plaintiff was permanently injured and made incapable of pursuing any kind of labor for a long space of time, and his capacity to labor was permanently impaired, and the said plaintiff was, and still is disfigured, and has suffered, and still suffers, great anguish of body and mind, to the damage of the said plaintiff in the sum of twenty-five thousand dollars (\$25,000).

Wherefore plaintiff prays judgment against the said defendant for the sum of twenty-five thousand dollars (\$25,000.00) as damages, and for all other proper relief.

NEILL B. FIELD,  
*Attorney for Plaintiff.*

TERRITORY OF NEW MEXICO.  
*County of Bernalillo:*

Joseph Schmitt, being first duly sworn, upon his oath deposes and says that he is the plaintiff in the above entitled action and that he has read the foregoing complaint and knows the contents thereof, and that the allegations contained therein are true of his own knowledge, except as to so much and such parts as are made on information and belief, and as to those parts he believes the same to be true.

JOE SCHMITT.

Subscribed and sworn to before me by Joseph Schmitt this seventeenth day of August, 1906.

[SEAL.]

DAVID A. LAWSON,  
*Notary Public, Bernalillo County, N. M.*

Endorsed: "Filed in my office this Aug. 18, 1906. W. E. Dame, Clerk.

And, thereafter, on to-wit, the 4th day of September, 1906, there was filed in the office of the Clerk of said Court in said cause, a Motion to Make More Definite and Certain, which said Motion was in words and figures, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

THE SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

5      *Motion to Make More Definite and Certain.*

Now comes the defendant in the above entitled cause and moves the Court to require the said plaintiff to make more definite and certain allegations in plaintiff's complaint, which said allegations are as follows:

1. Defendant asks that plaintiff be required to state specifically and definitely on what day of the month and year the injury complained of occurred.

2. Defendant also asks the court to require said plaintiff to state definitely and certainly when the alleged promise was made by said defendant to remedy the defects in the said appliances, defects in which are alleged by said plaintiff in said complaint to be the cause of the injury, giving the day and month upon which said promise was made.

3. Defendant further asks the court to require the plaintiff to allege definitely and with certainty at what time the defendant stated to the said plaintiff that the said cooker referred to in said complaint could and would be remedied.

4. And also state definitely and with certainty when the said material for remedying and repairing the said cooker had been ordered and when it was expected or stated by the defendant that the same would arrive for the purpose of being used in remedying the defects and repairing said cooker, as alleged in said complaint.

5. And also asks the court to require said plaintiff to make more definite and certain the allegation in said complaint contained that defendant on plaintiff's request promised the plaintiff to repair said cooker in a very short time, by stating more definitely what

the said promise was and within what time the said cooker was to be so repaired.

O. N. MARRON,  
W. B. CHILDERS,  
*Attorneys for Defendant.*

6       Endorsed: "Filed in my office this September 4, 1906.  
W. E. Dame, Clerk."

And thereafter, on to-wit, the 15th day of September, 1906, there was entered of record in the office of the Clerk of said Court in said cause, an order overruling motion to make complaint more definite and certain, which said order was in words and figures as follows, to-wit:

At a session of the District Court of the Second Judicial District of New Mexico within and for the County of Bernalillo begun and held at the Court House in Albuquerque on the 15th day of September, 1906, the following proceedings were had:

Present:

Hon. Ira A. Abbott, Judge.  
W. E. Dame, Clerk.

No. 7176.

JOSEPH SCHMITT

VS.

SOUTHWESTERN BREWERY & ICE COMPANY.

This cause coming on this day to be heard on defendant's motion to make the complaint more definite and specific, the court on consideration thereof, overrules the same, and defendant is given twenty days to answer the complaint.

7       And thereafter, on to-wit, the 5th day of October, 1906, there was filed in the office of the Clerk of said court in said case an Answer of the Defendant, which said Answer was in words and figures, to-wit:

In the District Court of the Second Judicial District and Territory of New Mexico within and for the County of Bernalillo.

JOSEPH SCHMITT, Plaintiff,

VS.

THE SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

*Answer of the Defendant, The Southwestern Brewery & Ice Company, to the Complaint of the Plaintiff.*

The defendant admits that on the second day of January, 1906, and for a long time prior thereto it had been engaged in the busi-

ness of conducting and carrying on a brewery for the manufacture of beer at Albuquerque, in the County of Bernalillo and Territory of New Mexico, and it admits that the said plaintiff was on the second day of January, 1906, employed by the defendant.

Defendant denies that on said second day of January, 1906, or at any other time it did furnish and provide for the plaintiff a cooker which was so out of repair and so insufficient for the purpose for which it was required to use the same that the plaintiff was unwilling to use it on said second day of January, or any other time; and this defendant denies that it requested the said plaintiff

to use the said cooker until material which had been ordered for the repair of said cooker should arrive; and denies that it promised the plaintiff to repair the said cooker in a very short time; or at any time; and this defendant denies that the said plaintiff consented to use the said cooker upon the request of the said defendant and *relying* upon the said alleged promise; and this defendant denies that — the said plaintiff *while* exercising due care for his safety, the said cooker gave way, and denies that it became leaky, and denies that it ceased to retain its contents, and denies that a large part of the boiling contents of said cooker was precipitated upon the said plaintiff.

## II.

This defendant denies each and every allegation of said complaint, not herein specifically admitted or denied.

And for a further and separate defense this defendant says that after the alleged supposed injuries complained of in said complaint and before the commencement of this action, the plaintiff, on to-wit, the 6th day of January, A. D. 1906, executed and delivered to this defendant, a release from all liability to him the said plaintiff, on the part of the said defendant by reason of the alleged injuries received, as suffered by the plaintiff, as alleged in the complaint; that the said release was executed by the said plaintiff and delivered as aforesaid for valuable considerations and in full settlement of any claim plaintiff may have had against the said defendant by reason of any negligence as alleged in the complaint of the plaintiff, on the part of this defendant, its officers or agents, and said defendant alleges that the said consideration, stated in the release was fully complied with on the part of the said defendant, a copy of which said release is hereto attached, marked "Exhibit A" and made a part of this answer and defense.

Wherefore defendant prays to be dismissed.

JACOB LOEBS.

9 TERRITORY OF NEW MEXICO,  
*County of Bernalillo:*

Jacob Loeb, being first duly sworn upon his oath deposes and says that he is President of the Southwestern Brewery & Ice Company, the defendant, and that he has read the foregoing answer

and knows the contents thereof, and that the same is true of his own knowledge.

JACOB LOEBS.

Subscribed and sworn to before me this 5th day of October, A. D., 1906.

[SEAL.]

JOHN VENABLE,  
Clerk District Court.

"EXHIBIT A."

Know all men by these presents: that I, Joseph Schmitt, of the City of Albuquerque, in the County of Bernalillo and Territory of New Mexico, for and in consideration of the Southwestern Brewery & Ice Company paying for all medical attention, hospital fees and medicines, and further that the Southwestern Brewery & Ice Company during the time of my sickness continues to carry me on the pay roll of the company and pays and is to pay me during my sickness the same wages as heretofore paid me by said company, and until the attending physician declares that I am able to resume my position and perform the duties thereof with said company, do hereby release and forever discharge the said Southwestern Brewery & Ice Company, its successors and assigns of and from all actions, causes of action, suits, controversies, claims and demands whatsoever, for or by reason of the accident which happened and occurred at the plant of the said Southwestern Brewery & Ice Company, on Tuesday, the second day of January, 1906, which said accident happened by reason of the tank known as the rice cooker, having exploded.

10 In witness whereof, I have hereunto set my hand and seal this 6th day of January, A. D., 1906. .

(Signed)

JOSEPH SCHMITT,  
His mark.

Witness:

ALICE GARCIA.  
MRS. J. W. PRESTEL.

Endorsed: "Filed in my office this October 5, 1906. John Venable, Clerk."

And thereafter, on to-wit, the 12th day of October, 1906, there was filed in the office of the Clerk of said Court in said cause, a Reply of plaintiff, which said reply was in words and figures, to-wit:



Territory of New Mexico, Bernalillo District Court.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

*Reply.*

The plaintiff for reply to the separate defense of the defendant set up in the second paragraph of its answer herein, denies that after the alleged injuries complained of in the complaint and before the commencement of this action, the plaintiff on, to-wit, the sixth day of January, A. D., 1906, or at any other times, executed or delivered to the defendant a release from all liability to him the said plaintiff on the part of the said defendant by reason of the alleged injuries received or suffered by the plaintiff as alleged in the said complaint.

The plaintiff denies that the said release was executed by the plaintiff or delivered for a valuable or any other consideration or that said release was in full settlement of any claim which this plaintiff may have had against the defendant by reason of any negligence as alleged in the complaint of the plaintiff on the part of the defendant, its officers or agents.

The said plaintiff denies that said consideration stated in the said pretended release was fully or at all, complied with on the part of the said defendant as consideration for the said release. On the contrary thereof, this plaintiff alleges that on the sixth day of January, 1906, this plaintiff was, as a result of the injuries alleged in the complaint, mentally incapable of entering into any contract or of understanding the terms and conditions of said release, and this plaintiff denies that he signed said release or authorized any other person to sign the same for him, and denies that the signature appended thereto is the signature of this plaintiff, or that the said paper, marked "Exhibit A," a copy of which is filed with the said answer of the defendant, is the act and deed of this plaintiff.

Having duly replied to said answer the plaintiff prays as in his original complaint.

NEILL B. FIELD,  
*Attorney for Plaintiff.*

TERRITORY OF NEW MEXICO,  
*County of Bernalillo:*

Joseph Schmitt, being first duly sworn on his oath, deposes and says that he has heard and read the foregoing reply and knows the contents thereof and the allegations contained therein are true of

12 his own knowledge, except as to so much and such parts as are alleged on information and belief, and to such parts he believes the same to be true.

JOSEPH SCHMITT.

Subscribed and sworn to before me this twelfth day of October, 1906.

[SEAL.]

DAVID A. LAWSON.

*Notary Public, Bernalillo County, New Mexico.*

Endorsed: "Filed in my office this October 12, 1906. John Venable, Clerk."

And thereafter, on to-wit, the 9th day of May, 1907, there was entered of record in the office of the Clerk of said Court in said cause, an order continuing said cause, which said order was in words and figures, to-wit:

At a session of the District Court of the Second Judicial District of New Mexico within and for the County of Bernalillo begun and held at the court house in Albuquerque on the 9th day of May, 1907, the following proceedings were had:

Present:

Hon. Ira A. Abbott, Judge.  
John Venable, Clerk.

No. 7176.

J. SCHMITT

vs.

SOUTHWESTERN BREWERY & ICE COMPANY.

By agreement of the parties herein, this cause is continued to the September, 1907, term of the District Court within and for the County of Bernalillo.

13 And thereafter, on to-wit, the 8th day of November, 1907, there was filed in the office of the clerk of the said District Court, in said cause, an Amended Answer of defendant, which said Amended Answer was in words and figures as follows, to-wit:

SCHMITT

vs.

SOUTHWESTERN BREWERY & ICE COMPANY.

*Amendment to Answer.*

(To be inserted after first paragraph on the first page of answer.)

Further *hearing* the defendant alleges that the said plaintiff was guilty of contributory negligence in the manner in which he used

the said cooker and appliances mentioned in said complaint and did not take the proper precautions in the use of the same in the condition in which it is alleged to have been. That said contributory negligence consisted in this, to-wit: That the said plaintiff against the instruction and direction of the defendant, used the said cooker in the cooking of the said mash under steam pressure and at a pressure of over ten pounds, and against the direction and instruction of the defendant, turned on steam at a high pressure, to-wit: At a pressure of over ten pounds, for the purpose of cooking said mash at the time the alleged accident occurred, when no pressure for the cooking of said mash was necessary and when any pressure not exceeding ten pounds would have been safe.

Defendant further alleges that it has no information from which it can state the date on which the plaintiff alleges and asserts that the promise to remedy the cooker and appliances referred to in the complaint was made by the defendant or any of its officers or agents, if any, which the defendant denies; defendant alleges that the time

14 between the making of said alleged promise, as alleged in the complaint, and the alleged occurrence for which recovery is sought by the plaintiff was an unreasonable length of time for the defendant to repair and remedy the defects in said cooker and appliances, and the plaintiff therefore assumed the risk of such employment after the lapse of a reasonable length of time.

SOUTHWESTERN BREWERY & ICE CO.,  
By HENRY LOEBS, *Secretary*.

TERRITORY OF NEW MEXICO,  
*County of Bernalillo:*

Henry Loeb, being first duly sworn, upon his oath deposes and says that he is the Secretary and Treasurer of the Southwestern Brewery & Ice Company, the defendant in the foregoing action, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except where it is therein stated to be upon information and belief, and as to those things he believes them to be true.

HENRY LOEBS.

Subscribed and sworn to before me this 8th day of November, 1907.

[SEAL.]

JOHN VENABLE, *Clerk*.

Endorsed: "Filed in my office this November 8, 1907. John Venable, Clerk."

And thereafter on to-wit, the 8th day of November, 1907, there was filed in the office of the Clerk of said Court in said cause, a Motion by the plaintiff to strike out of the amended answer filed herein on the 8th day of November, 1907, certain allegations, which said Motion was in words and figures, as follows, to-wit:

15 TERRITORY OF NEW MEXICO,  
County of Bernalillo:

In the District Court.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

THE SOUTHWESTERN BREWERY &amp; ICE COMPANY, Defendant.

*Motion to Strike Out.*

Comes now the plaintiff, by his attorney, and moves the court to strike out of the amended answer filed herein on the 8th day of November, 1907, the following allegations:

"Defendant further alleges that it has no information from which it can state the date on which the plaintiff alleges and asserts that the promise to remedy the cooker and appliances referred to in the complaint was made by the defendant or any of its officers or agents, but defendant alleges that the time between the making of said alleged promise, as alleged in the complaint, and the alleged occurrence for which recovery is sought by the plaintiff was an unreasonable length of time for the defendant to repair and remedy the defects in said cooker and appliances, and the plaintiff therefore assumed the risk of such employment after the lapse of a reasonable length of time."

Because the said allegation is not allegation of an ultimate fact, but is an allegation of a conclusion of law, and assumes that the length of time not fixed by the defendant is unreasonable, but gives to the plaintiff no information as to the fact relied upon to show the unreasonableness.

NEILL B. FIELD,

*Attorney for Plaintiff.*

Endorsed: "Filed in my office this November 8, 1907. John Venable, Clerk."

16 And thereafter, on to-wit, the 8th day of November, 1907, there was filed in the office of the Clerk of the said Court, in said cause, a Motion to make more definite and certain the second paragraph of the amendment to its answer filed herein on the 8th day of November, 1907, by the defendant, which said Motion was in words and figures, to-wit:

TERRITORY OF NEW MEXICO,  
County of Bernalillo:

In the District Court.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

THE SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

*Motion to Make More Definite and Certain.*

Comes now the plaintiff, by his attorney, and moves the court to require the defendant to make more definite and certain the second paragraph of the amendment to its answer filed herein on this 8th day of November, 1907, and to set forth and allege therein the following:

(a) At what time the alleged promise by the defendant to the plaintiff, referred to in said paragraph, is claimed by the defendant to have been made.

(b) At what time the cooker, referred to in said paragraph, became unsafe.

(c) What length of time, as claimed by the defendant, was reasonably necessary and requisite to repair the cooker and appliances after the promise was made.

NEILL B. FIELD,

*Attorney for Plaintiff.*

17      Endorsed: "Filed in my office this November 8, 1907.  
John Venable, Clerk."

And thereafter, on to-wit, the 7th and 8th day of November, 1907, there was entered on the records of the Court of said District in said cause, the proceedings of the trial by jury in part, and also an order overruling motion to strike out parts of defendant's amended answer, and also an order overruling motion of plaintiff for defendant to make more definite and certain their amended answer, which said proceedings and orders were in words and figures as follows, to-wit:

Record District Court, Bernalillo County, New Mexico.

September Term, November 7th, 1907.

No. 7176.

JOSEPH SCHMITT

vs.

SOUTHWESTERN BREWERY & ICE COMPANY.

This day came the parties herein and are at issue, also came the following named persons as jurors, to-wit:



Placido Salazar y Otero,  
F. A. Storts,  
Henry Gleason,  
Jose Gutierrez Garcia,  
Rafael Griego,  
C. A. Gilman,

Roman Nuames,  
C. F. Shelton,  
S. M. Porterfield,  
N. L. Kemmerer,  
Feliz Galindro,  
Julian Trujillo,

who were empaneled and sworn according to law.

And the hour for adjournment having come, further hearing in said cause is postponed to tomorrow morning at 9:30 o'clock.

18 September Term, November 8th, 1907.

No. 7176.

JOSEPH SCHMITT

vs.

SOUTHWESTERN BREWERY & ICE COMPANY.

Again come the parties herein and the jury heretofore empaneled and sworn to try said cause and the trial proceeds.

Upon hearing of motion of plaintiff to strike out parts of defendant's amended answer, and the court being fully advised as to said motion, overrules same.

Also motion of plaintiff for defendant to make more definite and certain their amended answer herein heard and overruled.

And the said jury having heard in part the evidence adduced by the parties herein and the hour of adjournment having come, further hearing in said cause is postponed to tomorrow morning at 9:30 o'clock.

And thereafter, on to-wit, the 8th day of November, 1907, there was filed in the office of the Clerk of said Court in said cause a Reply to Amended Answer, which said Reply was in words and figures, as follows, to-wit:

TERRITORY OF NEW MEXICO,  
*County of Bernalillo:*

In the District Court.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

THE SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

19 *Reply of Plaintiff to the Amended Answer of the Defendant.*

Comes now the said plaintiff by his attorney, and for reply to the amended answer of the defendant filed herein on the 8th day of November, 1907, says:

## I.

Further answering the plaintiff denies that he was guilty of contributory negligence in the manner in which he used the said cooker and appliances mentioned in said complaint and denies that he did not take proper precautions in the use of same. Plaintiff further denies that the said plaintiff, against the instructions and directions of the defendant, used the said cooker in the cooking of the said mash under steam pressure, at the pressure of over ten pounds, or that he, against the instructions and directions of the defendant, turned on the steam at a high pressure, to-wit, at a pressure of over ten pounds, for the cooking of the said mash at the time the alleged accident occurred, and denies that no pressure for the cooking of said mash was necessary, and denies that any pressure not exceeding ten pounds would have been safe, as alleged in the said amended answer, but on the contrary thereof, the plaintiff alleges that at the time of the said accident, he was using a pressure of less than ten pounds, and that such pressure was necessary to enable him to cook the said mash and that the mash could not have been cooked without the amount of pressure which the plaintiff was using at the time.

For further reply to said amended answer the plaintiff denies that the time between the making of the promise of the defendant to the plaintiff, as alleged in the complaint, and the occurrence, for which recovery is sought by the plaintiff, was an unreasonable length of time for the defendant to repair and remedy the defects in the said cooker and appliances. Plaintiff denies that he assumed

the risk of using the said cooker at the time of the accident.

20 Having fully replied, the plaintiff prays as in his original complaint.

NEILL B. FIELD,  
*Attorney for Plaintiff.*

Endorsed: "Filed in my office this November 8, 1907, John Venable, clerk."

And thereafter, on to-wit, the 9th, 11th, 12th, 13th, 14th and 15th days of November, 1907, there was entered on the records of the Court in said District, in said cause, the Proceedings of the trial by Jury, which said Proceedings were in words and figures as follows, to-wit:

Record District Court, Bernalillo County, New Mexico.

September Term, November 9th, 1907.

No. 7176.

JOSEPH SCHMITT

VS.

SOUTHWESTERN BREWERY & ICE COMPANY.

Again come the parties herein and the jury heretofore empaneled and sworn to try said cause and the trial proceeded.

And the said jury having heard the evidence adduced by the parties herein in part, and the hour for adjournment having come, further hearing in said cause is postponed to Monday morning at 9:30.

November 11th, 1907.

No. 7176.

JOSEPH SCHMITT

VS.

SOUTHWESTERN BREWERY & ICE COMPANY.

21 Again come the parties herein and the jury heretofore empaneled and sworn to try said cause and the trial proceeded.

And the said jury having heard in part the evidence adduced by the parties herein and the hour for adjournment having come, further hearing in said cause is postponed to tomorrow morning at 9:30.

November 12th, 1907.

No. 7176.

JOSEPH SCHMITT

VS.

SOUTHWESTERN BREWERY & ICE COMPANY.

Again come the parties herein and the jury heretofore empaneled and sworn and the trial proceeded.

And the said jury having heard the evidence adduced by the parties herein in part and the hour for adjournment having come, further hearing in said cause is postponed to tomorrow morning at 9:30.

November 13th, 1907.

No. 7176.

JOSEPH SCHMITT

vs.

SOUTHWESTERN BREWERY & ICE COMPANY.

Again come the parties herein and the jury heretofore empaneled and sworn and the trial proceeded.

And the said jury having heard in part the evidence adduced by the parties here and the hour for adjournment having come, further hearing in said cause is postponed to tomorrow morning at 9:30.

November 14th, 1907.

No. 7176.

JOSEPH SCHMITT

vs.

SOUTHWESTERN BREWERY & ICE COMPANY.

22 Again come the parties herein and the jury heretofore empaneled and sworn and the trial proceeded.

And the said jury having heard the evidence by the parties herein, and the hour for adjournment having come, further hearing in said cause is postponed to tomorrow morning at 9:00.

November 15th, 1907.

No. 7176.

JOSEPH SCHMITT

vs.

SOUTHWESTERN BREWERY & ICE COMPANY.

Again come the parties herein and the jury heretofore empaneled and sworn to try said cause and the trial proceeded.

And the said jury, having heard the evidence adduced by the parties herein, the argument of counsel and charge of the court, retired to their room in charge of the bailiff for deliberation.

And the hour for adjournment having come, it is ordered by the court that the sealed verdict of said jury be rendered in open court, whereupon court adjourned to tomorrow morning at 9:30.

And thereafter on to-wit, the 15th day of November, 1907, there was filed in the office of the Clerk of the said court in said cause, the Refused Instructions to the Jury of the defendant, which said Refused Instructions were in words and figures as follows, to-wit:

JOSEPH SCHMITT

VS.

SOUTHWESTERN BREWERY &amp; ICE COMPANY.

*Instructions Requested by the Defendant.*

23 The defendant asks the Court to instruct the Jury:

## I.

The Court instructs the jury that if they believe from the preponderance of the evidence that the plaintiff in the discharge of his duty in connection with the management of the cooker and cooking of the malt and other substances placed therein used more steam than was reasonably necessary to cook and prepare the malt or mash, with the preparation of which he was charged, or did not manage or control the steam and the apparatus with which he was furnished, then he cannot recover in this action.

Refused.

IRA A. ABBOTT,  
*Judge Second District.*

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

## II.

The jury are further instructed that if the plaintiff knew that the cooker which he was called upon to use was not in a safe condition and the fact that it was not in such condition was obvious or well known to the plaintiff at the time that he undertook the doing of the brewing by the use of said cooker, then the plaintiff cannot recover in this action although he may have consented to undertake the said work reluctantly; that if the jury believe that such were the facts from the preponderance of the evidence, that the danger was obvious or well known to the plaintiff, then the plaintiff assumed the risk in so doing, and the defendant is not liable and they should find a verdict in favor of the defendant. (Burke vs. Davis, 191 Mass., 76 N. E. 1039.)

24 Refused.

I. A. A.

Defendant excepts to refusal to give above instructions.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

The jury are further instructed that if the plaintiff, knowing the dangerous condition of the cooker, with the management of which



he was charged, still continued and consented to use the same and that the risk, if any, was obvious to him and that the danger was one not ordinarily incident to the business, that he might as a rule decline to accept the employment and discharge the said duty, and if he chose to encounter the danger and take his chances, he assumes the risk, and that this is so although the risk may have arisen from the negligent performance of the master's duty and its failure to have previously caused the cooker to be repaired and put in proper condition. (62 Atl. 1021. Vt.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

4.

The court instructs the jury that an employé who, knowing and appreciating the risk incident to his employment, voluntarily places himself in a position of danger with respect to the building in which he is to work or the machinery or appliances which he is called upon to use, and subjects himself to obvious danger, even though he should not appreciate the full extent of the danger, assumes the risk of the injury that may result to him therefrom; and if they believe from the preponderance of the evidence that the plaintiff well knowing the dangerous condition of the cooker  
25 mentioned in the pleadings and referred to in the evidence in this cause, continued to act as brewer on the morning of the second day of January, 1906, the day on which the said accident is alleged to have occurred, then they should find a verdict in favor of the defendant. (79 N. E. 233, Ohio.)

Refused.

I. A. A.

Defendant excepts to the refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

The jury are further instructed that the fact that the cooker mentioned in the pleadings and which the plaintiff was called upon to use, had been repaired upon former occasions and that repairs had been necessary, is not of itself sufficient to show conclusively that it was not reasonably adapted to and safe for the purpose for which it was used, if it could have been used by the plaintiff with ordinary care and precaution. And they are further instructed that the duty upon the employer to see that the appliances which he furnishes his employés are reasonably fit and safe for the use for which they are furnished does not relieve the employee from the

exercise of his own judgment in the use thereof, and if he uses them in a manner for which they are not designed to be used or subjects them to a strain beyond their capacity to bear, and is injured in consequence the employer is not liable. (Standard Distilling Co. v. Harris, 106 N. W. 582.) Salisbury v. Press Co., 108 N. W. 136.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

26

6.

The court further instructs the jury that needless exposure to a known danger by an employé is negligence; that a voluntary choice of an obviously dangerous way of doing work, when a reasonably safe way is available, is negligence, notwithstanding the customary use of such method; and that whether a choice of a particular method constitutes negligence depends upon the knowledge of the employé, actual or implied, of the danger and the conditions attending the doing of the work at the time of the injury. (8 Current Law, page 920.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

7.

The jury are instructed that although a servant may engage in employment and in the use of a defective place or defective machinery or appliances, known to him to be dangerous, and may have complained to his employer of such defects or danger, and although the employer may have promised to remedy such defects and may have failed to do so within a reasonable time, yet if the jury believe from the preponderance of the evidence, that the defects or danger was so imminent that a person of ordinary prudence would not have continued in the employment after the discovery of the defect, then the employé is not entitled to recover and if they believe from the preponderance of the evidence in this case that the plaintiff continued in the employment of the defendant, knowing that the condition of the cooker was such that no person of ordinary prudence would have continued in the employment, knowing such dangerous condition, then they should find a verdict in favor of the defendant. (126 Feb. Rep. 498; 117 U. S. 631; 56

Fed. Rep 981.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

8.

The jury are further instructed that if they believe from the preponderance of the evidence that the dangerous condition of the cooker was known to the plaintiff for months, or for any great length of time, or was generally known *as* was a matter of frequent discussion for months between the plaintiff and the defendant or its officers and agents, and that such dangerous conditions when so known was such that no person of ordinary prudence would have subjected himself to the risk of using said cooker, then, although they believe from the evidence that the defendant promised to remedy the defects, as testified to by plaintiff, on the day before the accident happened, the plaintiff is not entitled to recover and they should find a verdict in favor of the defendant.

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

The jury are further instructed that if they believe from the preponderance of the evidence that the defendant did not promise to repair said cooker on the second day of January, 1906, as alleged in the complaint, or on the first day of January, as testified to by plaintiff, and that the plaintiff well knew the dangerous condition of the said cooker when he entered upon the discharge of his duties on the morning of the second day of January, when it is alleged said accident occurred, then the plaintiff assume the risk and hazard of the employment in which he was engaged and is not entitled to recover in this case and the jury should find a verdict in favor of the defendant.

Refused.

I. A. A.

Defendant excepts to the refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

10.

The jury are further instructed that the master's duty to his servant with respect to machinery or appliances, is sufficiently discharged by providing those that are reasonably safe and fit; and an appliance is reasonably safe and fit when it can be used by the serv-

ant in the course of his employment, without danger to himself, by the exercise of ordinary care; and that if the jury believe from the preponderance of the evidence that the plaintiff did not exercise ordinary care in the use of the cooker mentioned in the complaint, then they should find a verdict in favor of the defendant. (140 Fed. Rep. 568.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instructions.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

11.

29 The court instructs the jury that although they may believe from the evidence that the plaintiff had complained of the defective conditions of the cooker mentioned in the complaint, and that the defendant had promised to make it safe by proper repairs, yet if the plaintiff fully appreciated the danger and it was so imminent that a man of ordinary prudence would refuse to encounter it, then such promise does not render the defendant liable in this case and the jury should find a verdict in favor of the defendant. (8 Current Law, 911.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

12.

The jury are further instructed that an employé who unnecessarily adopts a dangerous method of doing work when another method less dangerous is open to him, assumes the risk of so doing.

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

13.

The court instructs the jury that if they find a verdict in favor of the plaintiff after considering all the evidence and the instructions of the court, in estimating the damages which plaintiff is entitled to recover, they should confine themselves to such sum as will fairly

30 compensate the plaintiff for physical and mental suffering, if any, caused by the injury, and for any permanent impairment of his capacity to earn money, if any, that may have been caused by and directly resulted from the injury complained of; and their finding should be based upon the evidence in the cause as to each of the elements which the court has instructed you should be considered in arriving at the amount of your verdict.

In estimating these damages the jury are not at liberty to compensate him for loss of time or expenses incurred on account of his injury, it appearing from the evidence that he was paid his wages during the time he wasn't working on account of the injury and did not lose any money, and that all his expenses incident to the injury were also paid by the defendant.

Refused.

I. A. A.

Defendant excepts to refusal to give above instructions.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

14.

The jury are further instructed that in case of this kind, the defendant is not liable for vindictive damages, but only for such damages as are compensatory and fairly compensate the injured party for such injuries as he may have actually sustained, if any, and for his physical and mental suffering, if any of either, as the result of the injury, and for the permanent impairment, if any, of his capability to earn money, that may have been caused by and directly resulted from the injury complained of; but the court further instructs the jury that if evidence does not show that the plaintiff's earning capacity has been diminished, then they should not take this into consideration in arriving at the amount of their verdict.

Refused.

I. A. A.

31 Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

15.

The jury are further instructed that to entitle the plaintiff to recover in this case, he must satisfy you that the injuries complained of resulted from the negligence of the defendant and that at the time of the accident plaintiff was without any fault or negligence which proximately entered into and contributed to his injuries, for if at that time his negligence proximately contributed to his injuries it would defeat his right to recover.

Negligence, in a legal sense, has been defined to be a failure to observe, for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. (63 Atl., 937.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

16.

The court instructs the jury that it is the duty of the defendant to use ordinary care in furnishing a proper cooker and appliances which were reasonably safe and suitable for the purpose for which they were intended to be used; but the jury are further instructed that if they believe from a preponderance of the evidence that the accident was occasioned by any defect in the cooker furnished which

32 was not known to the defendant, or any of its officers or agents, and that the plaintiff, as well as the officers and superintendent or manager of the defendant, had equal opportunity to know the dangerous condition of the cooker used, then the plaintiff assumed the risk of the employment in which he was engaged and the defendant is not liable.

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

17.

The jury are further instructed that it was the duty of the defendant to use ordinary care to see that the cooker used by the plaintiff was reasonably safe and suitable for the purpose for which it was intended to be used; nevertheless, if the jury believes from a preponderance of the evidence, that the injury was caused not by any defect to which the attention of the defendant had been called and the repair of which had been attempted, as shown by the evidence, by patches, but some other defect which caused the accident, before the accident actually happened, it would not render the defendant liable, if the jury further believes from a preponderance of the evidence that within a reasonable time after its attention had been called to the general defective condition, if any, of the cooker, defendant had taken steps to remedy the same with as reasonable promptness and as soon as the same could have been reasonably remedied; and if the plaintiff continued in the employment of the defendant, with full knowledge of the facts and circumstances, and

without any specific promise on the part of the defendant to remedy such general defect, then the defendant is not liable and they should find a verdict for the defendant.

33

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

18.

The court instructs the jury that the defendant was required to use only ordinary care in furnishing a reasonably safe and suitable cooker for the purpose for which it was intended to be used. What is ordinary care cannot be determined abstractly. It is necessarily a relative term. It must be measured by the nature of the work to be done, the instruments to be used, the hazard and risk of the situation. The law by "ordinary care" means simply the caution and vigilance which reasonable and prudent men exercise under like circumstances. The jury are further instructed that in the exercise of ordinary care, the employer does not become an absolute insurer of the safety of the employee; nor is he bound under all circumstances to provide for him the most approved or best improved machinery and equipments, or such as are absolutely safe. His care in this respect is ordinary precaution.

Refused.

I. A. A.

Defendant excepts to refusal to give above instructions to jury.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

19.

The court instructs the jury that if in the present case you should find from the evidence that the plaintiff on the day that he is alleged to have signed the release offered in evidence was delirious or his mental faculties were otherwise obscured by the injuries from

34 which he was suffering, still this would not necessarily prevent him having sufficient capacity to execute such release.

Delirium or obscuration of the mental faculties by disease or injury must be so complete and so becloud the mind that the person entering into a contract sought to be impeached for want of capacity to make the same does not understand the nature of the business in which he is engaged, and does not understand at the time of executing the instrument, substantially the act and the extent of his rights and the effect of the instruments upon his rights.

The jury are further instructed that the burden of showing that the plaintiff's mental faculties were so effected by delirium, or were

so obscured by the effect of the injury which he had received as to completely becloud the plaintiff's mind that he did not understand the nature of the business in which he was engaged and the effect of the release which he alleged to have signed, upon his rights, is upon the plaintiff, and unless they believe from the preponderance of the evidence that such a state of facts is established, then they should find a verdict in favor of the defendant. (2 Blashfield, No. 2860-2863.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction to jury.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

20.

The court instructs the jury that in all cases involving questions of sanity and insanity, prima facie, the person is sane, and when there is only evidence sufficient to raise a doubt of a person's insanity, the presumption in favor of sanity must prevail. When an instrument is made by a person of competent age, and under no legal disability, it will be taken and held to be valid and binding until  
35 incompetency is established, by a preponderance of the evidence. (Sackett Inst. to Juries, p. 439.)

Refused.

I. A. A.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

21.

The jury are further instructed that if they believe from a preponderance of the evidence that the plaintiff had his mental faculties about him and understood the nature of the act which he is alleged to have done in signing the release offered in evidence, and so understanding the same, gave his assent to the execution of the said release by touching the pen, knowing that his name was signed to the same, thereby adopted the signature of his name signed thereto; and they should find a verdict in favor of the defendant.

Refused.

I. A. A.

Defendant excepts to refusal to give foregoing instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*



## 22.

The jury are further instructed that it is not necessary that the plaintiff should have actually signed his own name to the instrument offered in evidence as a release. If the plaintiff, knowing the nature of his act, with mental capacity sufficient to understand what he was doing, at the time that the same was presented to him, touched the pen and thereby assented to the execution of the said instrument, such touching of the pen and assent has the same effect in law as if he had signed his own name thereto.

(24 A. & E. Ency., 1067, 31 Pacific, 553.)

Refused.

I. A. A.

Defendant excepts to the refusal of the court to instruct the jury as above requested.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

## 23.

The defendant asks the court to instruct the jury that if the plaintiff knew the terms of the release substantially, although he may not have had a copy of it, and had reason to believe or knew that the weekly wages paid him were being paid in consequence of the release that he had signed, then the acceptance of such weekly wages was a ratification of his act, although he may not have been conscious and rational at the time that he signed the release.

Defendant excepts to refusal to give above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Attorneys for Defendant.*

Endorsed: "Filed in my office this Nov. 15, 1907. John Venable, Clerk."

And thereafter, on to-wit, the 15th day of November, 1907, there was filed in the office of the Clerk of said Court in said cause the Refused Instructions to the Jury of the plaintiff, which said Refused Instructions were in words and figures as follows, to-wit:

37 The court instructs the jury that negligence consists in the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. The question of negligence should be determined in all cases by reference to the situation and knowledge of the parties and all the attending circumstances. In an occupation, attended with danger, can be prosecuted with proper precaution, without injurious results, it is incumbent on the employer of others in such occupation to take all reasonable and needed precautions to secure the safety of the persons engaged therein, and for

any negligence in this respect from which injury follows to the employé, the employer may be held responsible and mulcted to the extent of the injury inflicted, if any. The law presumes that an employer exercises due care for the protection of his servants and that the servant exercises due care to secure his own safety and it is incumbent on the party alleging the want of such care to establish its absence by a preponderance of the evidence. In this case the burden of proof is on the plaintiff to establish by a preponderance of the evidence that he was injured by the negligence of the defendant and the burden of proof is upon the defendant to establish by a like preponderance of the evidence that the plaintiff by his own negligence contributed to his injury, or remained in the employment of the defendant and used the alleged defective cooker, for an unreasonable time after the defendant promised to repair the same, if such promise **was made**, what was or would have been a reasonable time to repair the said cooker is a question of fact to be determined by the jury from the evidence in the light of all the circumstances surrounding the parties at the time the promise was made, if such promise was made. (*Deserant v. Cerrillos Coal R. R. Co.*, 178 U. S.)

Refused.

IRA A. ABBOTT,  
*Judge Second District.*

38 The court instructs the jury that the plaintiff in entering the employment of the defendant assumed the ordinary risks incident to his employment, but did not assume the risk arising from the negligence of his employer, if any, to use reasonable care to furnish him with reasonably safe implements and appliances to be used by him in the performance of his duties, unless he consented to use such unsafe implements and appliances with knowledge of their condition and without exacting from the employer a promise to repair the same within a reasonable time, and if you believe from the evidence that the plaintiff consented to use the cooker testified about by the witnesses, in the condition in which it was on the 2nd day of January, 1906, without any assurance from the defendant that the same would be put in repair within a reasonable time, you are instructed, that by such use of the cooker the plaintiff assumed the risk of any injury which might happen to him on account of the unsafe condition of said cooker, if it was unsafe. If, however, you believe from the evidence that prior to the 2nd day of January, 1906, plaintiff had notified the defendant of the unsafe condition of the said cooker, and that the said defendant, in pursuance of such notice, promised the plaintiff to have the same put in repair, and requested the plaintiff to use the same in its then condition, until such repair could be made, and if you further believe from the evidence that on the 2nd day of January, 1906, a reasonable time for the making of such repairs had not elapsed, then you are instructed that the plaintiff did not, by the use of the cooker in its then condition, on the 2nd day of January, 1906, assume the risk of any injury which might occur to him by reason of its defective condition, if it was defective, but the defendant is liable to the plaintiff for the

injury, if any, which occurred to him by reason of the defective and unsafe condition of said cooker, on said 2nd day of 39 January, 1906, provided the plaintiff was, at the time of the injury, exercising due care for his own safety. (Rway. Co. vs. Archbold, 170, U. S.)

Refused.

I. A. A.

If the jury believe from the evidence that prior to the 2nd day of January, 1906, the cooker, referred to by the witnesses, was furnished by the defendant to the plaintiff for use by the plaintiff for the purpose of boiling mash, as alleged in the complaint, and that while the plaintiff was engaged in using the said cooker for such purpose, it became defective and unsafe for such use, and if the jury further believe from the evidence that in the latter part of the month of November, or in the early part of the month of December, 1905, both the plaintiff and the defendant knew of the defective condition of the said cooker, and the said defendant knew of the defective condition of the said cooker, and the said defendant, because of such defective condition, and at the instance of the plaintiff, contracted with the Albuquerque Foundry & Machine Company to repair the said cooker, and requested to plaintiff to continue the use of the said cooker until such repairs could be made, and if the jury further believe from the evidence that the plaintiff in consequence of such request and believing that such repairs would be made within a reasonable time, consented to use the said cooker in its then condition, and if the jury further believe from the evidence that the plaintiff relied upon the promise of the said defendant to have the said cooker repaired and attempted to use the same on the 2nd day of January, 1906, relying upon the said promise, and that because of the defective condition of said cooker on the 2nd day of January, 1906, the plaintiff was injured the defendant is liable to the plaintiff for such injuries, unless more than a reasonable time for the making of

40 such repairs had elapsed between the day on which the defendant employed the Albuquerque Foundry & Machine Company to make such repairs, and the said 2nd day of January, 1906, or, unless plaintiff was lacking in due care in the use of the said cooker in its then condition on the 2nd day of January, 1906.

Refused.

I. A. A.

The court instructs the jury that it is admitted by the pleadings in this case that at the time of the alleged accident the plaintiff was in the employe of the defendant corporation and the relation known to the law as that of master and servant existed between them, the defendant being the master and the plaintiff the servant. You are further instructed that it is the duty of the master to use reasonable care and diligence to provide reasonably safe implements and appliances for the use of his servants and to use reasonable care

and diligence to keep such implements and appliances in a reasonably safe condition for such use. Therefore, if you believe from the evidence that on the 2nd day of January, 1906, the plaintiff, in the performance of the work for which he was employed by the defendant, was required to use a certain implement and appliance called a cooker, referred to by the witnesses in their testimony, and that on the said 2nd day of January, the said cooker was not a reasonably safe implement and appliance for use by the said plaintiff, for the use for which it was intended, and if you further believe from the evidence that on the said 2nd day of January the said defendant knew, or ought to have known, of the unsafe condition of said cooker, if it was unsafe, you should find the issues for the plaintiff, unless you shall find from the evidence that the plaintiff assumed the risk of using the said cooker in its then condition, or was guilty of contributory negligence in the use of the said cooker in its then condition, as those terms will hereafter be defined in these instructions.

Refused.

I. A. A.

41 The court instructs the jury that the release pleaded and relied on by the defendant in this action, and which is in evidence before you, does not purport to have been signed by the plaintiff with his own hand, but does purport to have been signed by some other person at the instance and by direction of the plaintiff, and therefore it is incumbent on the defendant to show by a preponderance of the evidence that the plaintiff authorized some other person to sign the said release for him and on his behalf. If you believe from the evidence that at the time of the execution of the alleged release, the plaintiff was in such mental condition as to be incapable of understanding the nature and contents of the said instrument, he was also incapable of authorizing any other person to execute the same in his behalf. If the plaintiff was at the time of the execution of the said release, mentally incapable of understanding its nature and contents, it is not binding upon him, notwithstanding he may, after the execution of the said release, have received from the defendant party or all of the benefit which by the terms of the release the defendant agreed to confer upon him, unless he knew at the time of accepting such benefit or any part thereof, that the defendant was claiming to confer them in pursuance of the terms of the said release, and if the jury further believe from the evidence that the plaintiff was unaware of the terms of the said release, until a copy of the same was filed with the answer of the defendant, in this case, and that within a reasonable time after plaintiff obtained knowledge of the terms of the said release, he applied to the defendant in person or by his agent to be informed as to the amount of the alleged disbursements claimed by the defendant to have been made by it in pursuance of the terms of the said release with a view of tendering to the defendant repayment of the amount of such disbursements and the defendant refused to inform the plaintiff as

42 to the amount of such disbursements and announced its determination to refuse to accept reimbursements therefor at the hands of the plaintiff, the plaintiff was under no obligation to pursue the matter further and may recover in this action notwithstanding the said release.

Refused.

I. A. A.

Endorsed: "Filed in my office this November 15, 1907. John Venable, Clerk."

And thereafter on to-wit, the 16th day of November, 1907, there was filed in the office of the Clerk of said Court, in said cause, Instructions to the Jury, which said Instructions were in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,  
*Bernalillo County:*

In the District Court.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

*Instructions to Jury.*

GENTLEMEN OF THE JURY:

1.

The plaintiff in this cause seeks to recover damages for injuries alleged to have been received by him, January 2, 1906, while he was in the employ of the defendant at its brewery in this City, through the defective condition of the apparatus with which he was set to work by the defendant.

43 Defendant excepts.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*

2.

The defendant being a corporation necessarily acts through officers or agents, and it has not been questioned that the officers through whom it is claimed in behalf of the plaintiff it acted in the matter testified of in this cause, had power to act in the premises, whether they did so act or not.

Defendant excepts.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*

## 3.

It is a general rule of law that an employer is not the insurer of his employé against injury, but must use due care to provide safe machinery, appliances and tools for the use of his employees, and the employee must exercise due care in using them. Due care is such care as a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would presumably have exercised under the circumstances of the particular case. What would be due care in furnishing or using a hoe would not be due care in furnishing or using a steam engine. Negligence is the opposite of due care.

Defendant excepts to foregoing instruction.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*

## 4.

44 It is also a rule of law that if an employee learns or knows that the place in which or the appliances with which he is working are defective and dangerous, and continued to work without informing his employer of such condition, or if he does so inform him, fails to receive a promise to make the repairs or changes necessary to secure safety, he thereafter takes the risk of his employment under the existing dangerous condition.

Defendant excepts.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*

## 5.

But if he notifies his employer of such condition, receives his promise to amend the same and relying on such promise and by his employer's request, express or fairly to be inferred from the evidence, continues to work, although knowing of the defect and danger, and uses due care on his own part, having regard to the defective and dangerous conditions aforesaid, then, during the time reasonably necessary for making the repairs or changes necessary to secure safety, his employer will be liable to him in damages for any injuries he may receive while so employed, through such defective and dangerous conditions.

Defendant excepts to foregoing instruction.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*

## 6.

You are instructed, therefore, that if you find from a preponderance of the evidence that the plaintiff while in the employe of the defendant learned that the kettle or cooker, which he was operating

45 for the defendant in brewing beer, was in a defective and dangerous condition and made known the same to the defendant or its foreman under whom he was working, received the promise of the defendant that the cooker should be put in proper condition, continued to use the same, relying on such promise and within a time reasonably necessary to have it put in proper condition, he received injuries which were caused by its defective and dangerous condition, then you should find for the plaintiff, unless you also find from a preponderance of the evidence that he was guilty of contributory negligence by lack of due care in operating said cooker in view of its defective condition.

Defendant excepts.

W. B. CHILDERS,  
O. N. MARRON,  
*Its Attorneys.*

7.

You are instructed that if the foreman of the defendant instructed the plaintiff how to use the cooker, the plaintiff had a right to assume, in the absence of knowledge to the contrary that the cooker could be safely used in the way he was instructed to use it by the defendant, unless its condition, as it was known to him was so obviously dangerous that a man of ordinary prudence would not continued to use it.

Defendant excepts to above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Its Attorneys.*

8.

The defendant alleges further that if the plaintiff did at any time have a lawful claim against it, as he alleges and which it denies, he gave a written release of said claim for a good consideration.

46 To this the plaintiff replies that if the defendant obtained from him what purported to be a release, it was at a time when he was mentally incapable of executing a valid release.

Defendant excepts.

W. B. CHILDERS,  
O. N. MARRON,  
*Its Attorneys.*

9.

You are instructed that if the plaintiff did execute and deliver a valid release of any claim which he might have against the defendant for the injury on which this action is based, then your verdict should be for the defendant.



## 10.

The paper which has been offered in evidence before you as a release purports to have been signed by the plaintiff's mark. A signature by mark is valid. If made by the direction of the signer, given with full knowledge of what he is doing and its effect, but not otherwise. If the signature of the plaintiff was put to the paper in question by mark in his presence but without his rational knowledge of the fact and effect of what he was doing, or if with rational knowledge that he was directing his mark to be affixed to a written instrument, but he was mentally incapable of comprehending and did not comprehend the nature and effect of such instrument, then it was not a valid release.

Defendant excepts to above instruction.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*

## 11.

You are instructed that the legal presumption is in favor of sanity and of the capacity of a person of mature age who makes  
47 a contract or agreement to enter into and makes such agreement understandingly at the time the same was made, and the burden is on him who asserts the contrary to so prove by a preponderance of the evidence.

## 12.

If, however, the alleged release was not valid at the outset, yet, if afterwards the plaintiff with full knowledge and understanding of its contents accepted the consideration provided for by it, he is not entitled to recover damages in this action. But if at the time of accepting such consideration or any part thereof, he did not know that the defendant was claiming to act in pursuance of the terms of said release, was unaware of its terms until a copy of the same was filed with the answer of the defendant, in this case, and within a reasonable time after he obtained knowledge of the terms of said release, he applied to the defendant in person or by his agent to be informed as to the amount of the alleged disbursements claimed by the defendant to have been made by it in pursuance of the terms of the said release with the view of tendering to the defendant repayment of the same, and the defendant refused to inform the plaintiff as to the amount of such disbursements and announced its determination to refuse to accept reimbursement at his hands, the plaintiff was under no obligation to pursue the matter further, and the fact that such disbursements were made by the defendant will not prevent the plaintiff from recovering in this action.

Defendant excepts to foregoing instruction.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*



## 13.

48 You are instructed that if you find the issues for the plaintiff you should assess his damages at such sum, not exceeding twenty-five thousand dollars, the amount claimed in the complaint, as you believe from the evidence will fully compensate him, so far as compensation in money may be made, for the injuries, if any, which he has received, and in assessing such damages you have a right to take into consideration plaintiff's loss of time, with reference to his condition and ability to earn money in his business or calling, his loss from the impairment, if any, of his capacity to earn money, whether such impairment, if any, be temporary or permanent, and also his physical pain, suffering and disfigurement, if any, resulting from such injuries. You may also consider whether or not the evidence satisfies you that the plaintiff is reasonably certain to suffer in the future as the result of his injuries further physical pain and is reasonably certain to be physically unable to earn as much money as he was able to earn before the accident, and may allow compensation for such future physical pain and the impairment of his ability to earn money if the evidence justifies you in believing that the plaintiff is reasonably certain, in the future, to suffer such physical pain and to have his ability to earn money impaired as a direct result of such injuries. From the amount of damages, if any, to which upon the evidence and these instructions you may find the plaintiff is entitled, you should deduct the amount of disbursements by the defendant for the plaintiff as detailed in the evidence, and which the plaintiff expresses his willingness to pay, namely, the sum of \$910.30.

Defendant excepts to foregoing instruction.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*

## 14.

49 In the course of the trial there have been various proffers of evidence made on one side and the other which the court held to be inadmissible. After so long a trial it may be difficult for you to distinguish, by memory, in every instance between what was admitted as evidence and what was offered but not admitted. You should, however, use your best effort to make that distinction as mere offers of proof and proffers of evidence, including evidence of which you have heard but which was afterwards ordered to be struck out by the court, should be wholly disregarded by you.

Defendant excepts.

W. B. CHILDERS,  
O. N. MARRON,

*Its Attorneys.*

## 15.

By a preponderance of evidence is not meant more witnesses, or a greater amount of testimony, but that in your belief the evidence

on the affirmative of any particular question, much or little, and whether from one witness or more, must to some extent outweigh that on the negative of the same question.

Defendant excepts.

W. B. CHILDERS,  
O. N. MARRON,  
*Its Attorneys.*

16.

It is your duty to carefully scrutinize and to dispassionately weigh the testimony of all the witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witness as true, if for any good reason it appears unreliable or untrue. You have no right  
50 to reject the testimony of any of the witnesses without good reason, arising from the evidence in the case which includes the appearance and manner of witnesses in testifying as well as what they said.

Defendant excepts.

W. B. CHILDERS,  
O. N. MARRON,  
*Its Attorneys.*

17.

You are the sole judges of the weight of the evidence, and of the credibility of the witnesses. To determine what weight should be given to the testimony of any particular witness you should take into consideration his apparent capacity for observing, and remembering and describing what he has seen and heard, as people differ greatly in that respect. His opportunity of knowing that of which he testifies should also be taken into account, and you should especially consider whether he has any interest, bias, or prejudice likely to affect his testimony. If you believe from the evidence in the case that any witness has such an interest, bias, or prejudice, you should allow it such weight as you think proper to determine the value of his testimony.

If you believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material facts you may disregard the whole testimony of such witness or you may give such weight to the evidence of such witness on other points as you may think it entitled to.

Defendant excepts to above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Its Attorneys.*

51

18.

The arguments of counsel on either side are not evidence, nor are they to be taken by you as correct statement of the law, which is to be given to you by the court.

19.

You have no right to allow your prejudices or your sympathies to affect your verdict, but you are bound to decide according to the evidence as you have heard it and the law as given to you by the court.

20.

You will have with you two forms of verdict, by one of which you can find for the plaintiff, and by the other for the defendant. In the former will be a space for the insertion of the amount of damages you may assess.

Defendant excepts to above instruction.

W. B. CHILDERS,  
O. N. MARRON,  
*Its Attorneys.*

On retiring you will choose a foreman and return your verdict signed by him in open court through him.

IRA A. ABBOTT, *Judge.*

Endorsed: "Filed in my office this November 16, 1907. John Venable, Clerk."

And thereafter, on to-wit, the 16th day of November, 1907, there was filed and entered of record in the office of the Clerk of said Court, in said cause, the Verdict of the Jury and Special Findings which said verdict and special findings were in words and figures as follows to-wit:

52 TERRITORY OF NEW MEXICO:

In the District Court, Bernalillo County.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

We, the jury, find the issues for the plaintiff, and assess his damages at \$7,500.00 less \$910.30.

N. L. KEMMERER,  
*Foreman.*

Endorsed: "Filed in my office this November 16, 1907. John Venable, Clerk."

JOSEPH SCHMITT  
VS.  
SOUTHWESTERN BREWERY & ICE COMPANY.

The defendant asks the court to submit to the jury the following questions, to be answered by them as special findings:

1. Was the plaintiff conscious and rational at the time his mark was affixed to the release offered in evidence by the defendant?

No.

2. Was the plaintiff delirious, unconscious or irrational after the accident, and if so, for what period of time?

Yes, about 10 days.

53 3. Was the plaintiff unconscious, delirious or irrational continuously from the time of accident until after his mark was affixed to the release offered in evidence by the defendant?

Yes.

4. Was the cooker which the plaintiff was using at the time that the accident occurred in such a bad condition and state of repair that any man of ordinary care, prudence and precaution would not have used the same?

No.

5. Was the plaintiff sufficiently advised that the cooker was in such condition that it could not be used with safety pending the time after the order was given for the procurement of the material and repair of the cooker and the happening of the accident?

No.

6. Did the defendant, through Henry Loeb, its manager, at any time promise the plaintiff that the cooker would be repaired, as an inducement for him to continue using the same?

Yes, at the time it was examined by Mr. Ridley.

7. Could the cooker have been used by the plaintiff for the purpose for which he was using it, without turning on a degree of pressure of steam which would have caused the accident?

No.

8. Could the plaintiff have used the cooker for the purpose for which he was using it without turning on sufficient steam to create any pressure on the cooker?

No.

54 9. Would the accident have happened if the plaintiff had done the brewing, if it could have been so done, without using pressure?

No.

10. Was the cooker in such condition to the knowledge of the plaintiff at the time that he did the brewing that the use of steam in the doing of the brewing was so hazardous as to prevent an ordinary cautious and careful man from using the same?

No.

11. Did the defendant use ordinary care and precaution in furnishing the cooker which was used by the plaintiff, and in having it repaired when repairs were needed?

No.

12. Did the plaintiff, with knowledge of the conditions of the release claimed to have been executed by him, accept and receive his weekly wages from the defendant company before he returned to his work and began active service as an employé of the defendant company?

No.

13. Did the plaintiff on the second day of January, 1906, the days the accident happened, have as much knowledge of the condition of the cooker as did the defendant and its agents and officers?

Yes.

14. Did the plaintiff have as much knowledge of the condition of the cooker at and before the time of the accident as did the defendant?

Yes.

Endorsed: "Filed in my office this November 16, 1907. John Venable, Clerk."

55 And thereafter on to-wit, the 20th day of November, 1907, there was filed in the office of the Clerk in said Court, in said cause, a Motion for New Trial, which said motion was in words and figures as follows, to-wit.

TERRITORY OF NEW MEXICO,  
*County of Bernalillo:*

In the District Court.

No. 7176.

JOSEPH SCHMITT

vs.

SOUTHWESTERN BREWERY & ICE COMPANY.

*Motion for New Trial.*

Comes now the defendant in the above entitled cause and moves the court to set aside the verdict rendered in the said cause, and grant it a new trial, the grounds of the said motion are as follows:

1st. Because the plaintiff admitted over the objection of the defendant irrelevant, immaterial and incompetent testimony on the trial, in that the plaintiff's counsel was permitted to ask leading questions continuously and persistently on some of the most important matters in the cause, as in the case of the witness, Schmitt, the court permitting him to be thus plied with questions, and eliciting the answer to the effect that the plaintiff was requested by the defendant to use the cooker on the first day of January under promise by the defendant to repair, which questions were grossly leading, suggestive and abusive of discretion.

2nd. Because the court permitted the plaintiff to prove by witnesses who had not qualified themselves as experts, and who had

not shown sufficient knowledge so to testify to the mental condition of the plaintiff continuously after the injury, these witnesses being the plaintiff's wife and sister, Mrs. Schmitt and Mrs. With, 56 and Mr. With and the witness Bossert.

3rd. Because the court permitted the witness Ridley to express his opinion while on the witness stand without qualifying himself to do so and testified to immaterial, irrelevant and incompetent matters.

4th. Because the court refused to admit relevant, material and competent testimony offered by the defendant upon the trial of the said cause, which plainly appears upon the face of the records.

5th. Because the court erroneously instructed the jury as to the law of said cause, and the defendant particularly specified the following instructions:

(a) Instruction No. 3. In that it uses the words "due care" and not "ordinary care" and does not state the law as favorably to the defendant as it should have stated it, and as asked for by the defendant.

(b) Instruction No. 4. Because said instruction submits to the jury the proposition that the defendant could have been bound by the implied promise to repair, when such is not the law, and because there is no testimony in the case upon which said instruction could be based.

(c) Instruction No. 6. Because the said instruction does not correctly charge the jury as to the law of ordinary care used, the court using the expression "due care" and fails to define what would be a reasonable time for the plaintiff to rely upon the defendant's promise to repair the cooker, and is otherwise inaccurate and misleading.

(d) Instruction No. 7. Because it is not based upon any 57 evidence in the cause, and plaintiff had not received the instructions relative to the use of the cooker since he first commenced using it in April, 1905, and because the jury have found by their special findings that the plaintiff has as much knowledge of the condition of the cooker when he was using it as the defendant, and because said instruction is misleading and does not correctly state the law.

(e) Instruction No. 10. Because the said instruction is conflicting and misleading in that if the plaintiff with rational knowledge directed his mark to be affixed thereto, he must have been necessarily mentally capable of comprehending the nature and effect of such instrument, and because the testimony of the plaintiff is that he was absolutely irrational all of the time.

(f) Instruction No. 12. Because the said instruction in effect, tells the jury that if the plaintiff was unaware of the exact terms of the release until a copy of it was filed with the pleadings, then he could accept his pay under the release and that said pay would not be a ratification, and because said instruction is not based upon the evidence, the uncontradicted testimony being that plaintiff did know that such a paper had been executed by him, and did know that he was receiving pay under the agreement mentioned in the paper.

(g) Instruction No. 13. Because the instruction submits to the

jury elements of damages which are not based upon evidence in the cause, especially future incapacity to earn money, and future disfigurement and physical pain, and because the instruction submits to them the right of the plaintiff to recover twenty-five thousand (\$25,000) dollars, when it clearly appears from the evidence that the said sum is grossly excessive and because the said instruction does not state the law relative to damages in this case, and because the said instruction does not state the law as to the preponderance of evidence as against the defendant.

58 (h) Instruction No. 16. Because said instruction fails to point out to the jury that they consider and should consider any interest that witnesses may have held in the cause and his relation thereto, or the parties connected therewith.

6th. Because nowhere in the instruction is the rule of preponderance of evidence in favor of the defendant stated to the jury, although such instructions were requested by the defendant.

7th. Because the court refused defendant's requested instructions numbered one to twenty-three inclusive, and defendant points out the following grounds of exception:

(a) Because requested instruction No. 1 correctly defines the rule of preponderance of evidence applicable to the cause, and an insufficient instruction was given by the court on this subject; and also submits other matters which the defendant was entitled to have submitted to the jury, not covered by the Court's instructions.

(b) Because the court refused to give requested instruction No. 2 which said instruction correctly submits the law as to the effect that the obvious condition of the cooker or its known condition to the plaintiff at the time he undertook to use the same when the accident happened would have upon the plaintiff's rights.

(c) Because the court refused to give requested instruction No. 3, which said instruction correctly defines the assumption of the risk on the part of the employé, and it is not properly defined in any other instruction in the cause.

(d) Because the court refused to give requested instruction No. 4, which said instruction correctly defines the assumption of the risk on the part of the employé, and it is not properly defined in any other instruction in the cause.

59 (e) Because the court refused to give requested instruction No. 5, which correctly defines the risk assumed by plaintiff and no instruction is given covering the proposition contained in requested instruction.

(f) Because the court refused to give requested instruction No. 6, which instruction correctly states the law, and it is called for by the evidence, and is not submitted to the jury by any other instruction given.

(g) Because the court refused to give requested instruction No. 7, which instruction correctly states the law with reference to any alleged promise that may have been made by the defendant to remedy defects, provided such defects were obvious to the party using same, and that the defendant had failed to remedy same after



a reasonable time from the making of such promise, and such proposition is not covered by any other instruction in the cause.

(h) Because the court refused to give requested instructions Nos. 8 and 9, which instructions correctly state the law on the same proposition as given in the preceding instruction and as applicable to the evidence and is not covered by any other instruction.

(i) Because the court refused to give the requested instructions Nos. 10, 11 and 12, which instructions correctly state the rule of law as to ordinary care on the part of the plaintiff, under the evidence in this cause; and because the court did not give any instruction on the rule of law as to ordinary care applicable to the evidence in this cause.

60 (j) Because the court refused to give the requested instructions Nos. 13 and 14, which instructions correctly state every element of damage which the jury were entitled to consider in arriving at their verdict in this cause, and because it correctly states the rule of compensation, and the instructions given by the court includes elements not properly to be considered by the jury, and does not state the rule of compensation correctly.

(k) Because the court refused to give the requested instruction No. 15, which instruction correctly states the rules of proximate cause and correctly defines negligence, and these propositions are not covered by any instruction given by the court.

(l) Because the court refused to give requested instructions Nos. 16, 17 and 18, said instructions stating the rule of law correctly as to the degree of care incumbent upon the defendant and the effect of the knowledge and want of knowledge of the defect of the cooker, or as to whether or not the injury was occasioned by defects to which the attention of the defendant had been called, which is not covered by any other instruction.

(m) Because the court refused to give requested instruction No. 19, which said instruction asked the court to define the effect of delirium or obscuration of the mental faculties in such a case as this, and the rule of the preponderance of evidence or burden of proof applicable thereto, which is not covered by any other instruction in the cause.

(n) Because the court refused to grant instruction Nos. 20, 21 and 22, as to presumption and burden of proof in such cases, for the same reason as to the foregoing instructions.

61 (o) Because the court refused to grant requested instruction No. 23, for the reason that it was contended and the court instructed the jury in effect that unless the plaintiff had a copy of release, any other knowledge would not have bound him, although with such knowledge he may have received his weekly wages thereunder, before resuming his employment with the company.

8th. Because the verdict in this case is contrary to and not supported by the evidence; because an inspection of the special findings in this cause made by the jury show that the jury has made findings not based upon the evidence, and not sustained by any evidence in the case, which said findings are numbered as follows:



## No. 2, No. 5.

The jury have found by No. 13 that the plaintiff had as much knowledge of the condition of the cooker as the defendant.

## No. 6.

The plaintiff not having testified to any thing that was said at that time and the defendant simply having testified what he repeated to the plaintiff what Ridley had told him.

## No. 7 and No. 8.

Also because the finding No. 9 is in conflict with findings Nos. 7 and 8.

## No. 10 and 11.

Because they are not sustained by evidence, and in conflict with other findings pointed out.

## No. 13 and 14.

Because finding No. 13 precludes any recovery in this cause, and is in conflict with other findings, and shows that there was no negligence on the part of the defendant.

62 9th. Because the verdict is excessive and must have included punitive damages under the instructions of the court, and the refusal of the court to instruct upon that subject, as requested by the defendant.

10th. And for many other good and sufficient reasons and apparent on the face of the record.

Wherefore defendant prays that the verdict of the jury herein be set aside, and set for nought, and that it be granted a new trial.

W. B. CHILDERS,

O. N. MARRON,

*Attorneys for Defendant.*

11th. Because the court erred in overruling the motion of the defendant to direct the jury to return a verdict in favor of the defendant at the close of the testimony for the plaintiff.

12th. Because the court erred in overruling the motion of the defendant to direct the jury to return a verdict in favor of the defendant at the close of all of the testimony in the cause.

Endorsed: "Filed in my office this November 20, 1907. John Venable, clerk."

And thereafter, on to-wit, the 20th day of November, 1907, there was filed in the office of the Clerk of said Court in said cause, a Motion for Judgment, which said Motion was in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,  
*County of Bernalillo:*

In the District Court.

63

No. 7176.

JOSEPH SCHMITT

vs.

SOUTHWESTERN BREWERY &amp; ICE COMPANY.

*Motion for Judgment.*

Now comes the defendant in the above entitled cause and moves the court to enter judgment in said cause in its favor.

1. Because the questions answered as special findings Nos. 13 and 14 are inconsistent with the general verdict.

2. Because said special findings Nos. 13 and 14 especially taken in connection with special findings Nos. 4 and 5 are inconsistent with the general verdict.

3. Because special findings Nos. 13 and 14 taken in connection with special finding No. 9 are inconsistent with the general verdict.

4. Because the special findings construed together as a whole are inconsistent with the general verdict.

O. N. MARRON,

W. B. CHILDERS,

*Attorneys for Defendant.*

Endorsed: "Filed in my office this November 20, 1907. John Venable, clerk."

And thereafter, on to-wit, the 24th day of December, 1907, there was entered of record in the office of the Clerk of said Court in said cause, an Order Overruling Motion for New Trial and Motion for Judgment by the defendant, also an Order of Judgment, which said orders were in words and figures as follows, to-wit:

64 *Record District Court, Bernalillo County, New Mexico.*

September Term, December 24th, 1907.

Court met pursuant to adjournment.

Present: Hon. Ira A. Abbott, Judge: John Venable, Clerk.

No. 7176.

JOSEPH SCHMITT

v.

SOUTHWESTERN BREWERY &amp; ICE COMPANY.

This cause came on to be heard upon the motion of the defendant for a new trial, and the court after hearing the argument of counsel

for plaintiff and defendant, and being fully advised in the premises, thereupon overrules said motion, to which ruling of the court the defendant then and there duly excepts.

Wherefore it is considered, ordered and adjudged that the plaintiff have and recover of the defendant the sum of \$7,500, less \$910.30, otherwise the sum of Six Thousand, Five Hundred and Eighty-nine dollars and seventy cents, the amount of damages assessed by the jury in their verdict, together with his costs in this behalf expended to be taxed and may have execution; and the defendant being present by counsel, prays an appeal to the Supreme Court, which is granted.

And thereafter, on to-wit, the 8th day of February, 1908, there was filed in the office of the Clerk of said Court in said cause, 65 a Supersedeas Bond, which said Bond was in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,  
*County of Bernalillo:*

In the District Court.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

*Supersedeas Bond.*

Know all men by these presents: That we, the Southwestern Brewery & Ice Company, a corporation organized and existing under the laws of the Territory of New Mexico, with its principal place of business at Albuquerque, County of Bernalillo, and Territory of New Mexico, as principal, and Don J. Rankin, Henry Loebs and Otto Dieckman, as its sureties, are held and firmly bound unto Joseph Schmitt in the sum of Fourteen Thousand Dollars (\$14,000.00) for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seal- and dated at Albuquerque, New Mexico, this 7th day of February, A. D., 1908.

The condition of the foregoing obligation is such that whereas, on to-wit, the 24th day of December, A. D. 1907, in the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, the said Joseph Schmitt recovered a judgment against the said principal, the said Southwestern Brewery & Ice Company, in the sum of Six Thousand, Five Hundred, Eighty-nine and 70/100 dollars (\$6,589.70), and

66 Whereas the said principal, the Southwestern Brewery & Ice Company, has prayed for and had granted to it, an appeal

from the said judgment to the Honorable, the Supreme Court of the Territory of New Mexico.

Now, therefore, if the said principal, the said Southwestern Brewery & Ice Company shall prosecute its said appeal with effect and abide by and pay such judgment and all costs that may be adjudged against it, in case such appeal be dismissed or the decision of the District Court be affirmed, and perform the judgment of the said Supreme Court, then this obligation to be null and void; otherwise to be and remain in full force and effect.

In witness whereof, the said, the Southwestern Brewery & Ice Company, under and by virtue of the resolution of its Board of Directors has caused this instrument to be executed in its behalf, by its President and attested by its Secretary, this 7th day of February, 1908.

[SEAL.]

THE SOUTHWESTERN BREWERY &  
ICE COMPANY,

By OTTO DIECKMANN, *its President.*

Attested by.

D. J. RANKIN,

*Its Secretary.*

HENRY LOEBS.

[SEAL.]

DON J. RANKIN.

[SEAL.]

OTTO DIECKMAN.

[SEAL.]

TERRITORY OF NEW MEXICO,

*County of Bernalillo, ss:*

On this 7th day of February, 1908, before me personally appeared Otto Dieckman, to me personally known, *he* being by me duly sworn, did say that he is the President of the Southwestern Brewery & Ice Company; that the seal affixed to the said instrument is the corporate seal of the said corporation, and that said instrument was signed and sealed on behalf of the said corporation by authority of its Board of Directors, and the said Otto Dieckman acknowledged said instrument to be the free act and deed of said corporation.

67

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.]

A. B. STROUP,

*Notary Public.*

TERRITORY OF NEW MEXICO,

*County of Bernalillo, ss:*

On this 7th day of February, 1908, before me personally appeared Otto Dieckman, Don J. Rankin and Henry Loeb, the sureties on the above and foregoing bond, and each acknowledged to me that he executed the same for the uses and purposes therein mentioned, and that the same was the free act and deed of each.

And the said Otto Dieckman, Don J. Rankin and Henry Loeb, each being by me duly sworn, each did say that he is worth the sum set opposite his respective name in property situate in the Territory

of New Mexico, over and above all his just debts and liabilities, and the amount by law exempt from execution and forced sale.

Henry Loeb	\$10,000.00
Don J. Rankin	10,000.00
Otto Dieckman	10,000.00

Acknowledged, subscribed and sworn to before me this 7th day of February, 1908.

[SEAL.]

A. B. STROUP,  
*Notary Public, Bernalillo County, N. M.*

The Foregoing Bond as to form and sufficiency of sureties thereon, approved by me this 8th day of February, 1908.

JOHN VENABLE.

Endorsed: "Filed in my office this February 8, 1908. John Venable, Clerk."

68 And thereafter, on to-wit, the 27th day of March, 1908, there was filed in the office of the Clerk of said Court, in said cause, a Stipulation, which said Stipulation was in words and figures as follows, to-wit:

In the District Court of the Second Judicial District of the Territory of New Mexico within and for the County of Bernalillo.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

*Stipulation.*

It is hereby stipulated by and between the attorneys for the plaintiff and the defendant, that an extension of time of thirty (30) days be given for the preparing and filing of the transcript in said cause in the Supreme Court.

NEILL B. FIELD,  
*Attorney for Plaintiff.*  
O. N. MARRON,  
*Attorney for Defendant.*

Endorsed: "Filed in my office this March 28, 1908. John Venable, Clerk."

And thereafter, on to-wit, the 27th day of March, 1908, there was filed and entered of record in the office of the Clerk of said Court, in said cause, an Order Extending Time for Preparing Appeal Papers, which said Order was in words and figures as follows, to-wit:

69 In the District Court of the Second Judicial District of the Territory of New Mexico within and for the County of Bernalillo.

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

*Order.*

It appearing to the court that the attorney for the plaintiff and the defendant respectively, have stipulated that the time for the preparing of the transcript of the record for filing in the Supreme Court be extended thirty (30) days.

I is hereby ordered by the court that the time for such filing be and it is hereby extended thirty (30) days.

IRA A. ABBOTT, *Judge.*

Endorsed: "Filed in my office this March 27, 1908. John Venable, Clerk."

And afterward, to-wit, the 14th day of April, 1908, there was filed and entered in the office of the Clerk of said Court, in said cause, an Order of Extension of Time, which said Order was in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,  
*County of Bernalillo:*

In the District Court.

70

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

For good cause shown, the attorneys for the plaintiff and the defendant consenting, it is hereby ordered by the court that the time for the filing of the record in this cause in the Supreme Court and the settling of the Bill of Exceptions is further extended ten days.

IRA A. ABBOTT, *Judge.*

Endorsed: "Filed in my office this April 14, 1908. John Venable, Clerk."

And thereafter, on to-wit, the 22nd day of April, 1908, there was filed and entered of record in the office of the Clerk of said Court in

said cause, an Order of Extension of Time, which said order is in words and figures as follows, to-wit:

In the District Court of the Second Judicial District of the Territory of New Mexico within and for the County of Bernalillo.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

71 For good cause shown, it is hereby ordered that an additional ten days be and it hereby is granted for the settling of the Bill of Exceptions, and the filing of the transcript in the above entitled cause in the Supreme Court; this in addition to any time heretofore granted in said cause for said purposes.

IRA A. ABBOTT, *Judge*.

Endorsed: "Filed in my office this April 22, 1908. John Venable, Clerk."

And thereafter, on to-wit, the 24th day of April, 1908, there was filed in the office of the Clerk of said Court in said cause, a Bill of Exceptions, which said Bill of Exceptions *were* in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,

*County of Bernalillo:*

In the District Court.

Cause No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

*Bill of Exceptions.*

Be it remembered that on the trial of this cause, the following proceedings were had:

TERRITORY OF NEW MEXICO,

*County of Bernalillo:*

In the District Court.

72

No. 7176.

JOSEPH SCHMITT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE COMPANY, Defendant.

Trial.

And now, on this 7th day of November, 1907, at 4 o'clock p. m., the above entitled cause comes on for trial before Hon. Ira A. Abbott, Judge, and Jury:

Mr. Neill B. Field appeared for the plaintiff.

Mr. O. N. Marron and Mr. W. B. Childers appeared for the defendant.

A Jury was duly empaneled and sworn to try the cause.

The hour of 5:30 p. m. having arrived an adjournment was had until tomorrow morning at 9:30 a. m.

And now on this November 8th, 1907, pursuant to adjournment the trial of this cause proceeds.

MR. CHILDERS: If it pleases the court the defendant asks leave to amend the answer at the end of the first paragraph thereof and the first page.

(The proposed amendment was submitted to the court in writing.)

MR. FIELD: I certainly object to the defendant being allowed to amend the answer in these particulars at this time.

THE COURT: I think if the matter is to be discussed, I must send the jury out.

Thereupon, by direction of the court, the jury retired to their jury room.

73 THE COURT: You offer it now?

MR. CHILDERS: Yes, sir.

THE COURT: I suppose if it should appear that the evidence requires a change in the pleadings you could make it later.

MR. FIELD: This is introducing an entirely new defense. And the issues have been made up for a year.

MR. CHILDERS: It is a question in my mind whether it is necessary to plead these two defenses.

THE COURT: You have offered it now and I can consider it later after the plaintiff's case is in.

MR. CHILDERS: I think the questions will arise probably under it in the plaintiff's case.

THE COURT: I will take the pleadings and look them over. I have not looked at them since they were up on demurrer, and it will save time.

MR. CHILDERS: I want the court to consider it as offered now.

MR. FIELD: I would certainly like to know what the issues in this case are before I commence to try it. I would like to show your honor authority on this proposition, that this is absolutely a new and affirmative defense.

74 After argument

THE COURT: I think I will allow the amendment at least. Perhaps Mr. Childers can give it to his stenographer and have it written out.

MR. CHILDERS: Yes, sir; we will do that.

MR. FIELD: I ask until 2 o'clock to see whether I am prepared to meet this new issue in the case.

THE COURT: I think that is reasonable.

Thereupon the jury, by direction of the court, returned to the jury box.

THE COURT: Gentlemen: A question has arisen in this case, which



makes it advisable that you be excused until 2 o'clock before we proceed any further with this case. So I will excuse you until 2 o'clock.

Thereupon a recess was taken until 2 p. m., and at 2 p. m. the cause proceeded.

Mr. FIELD: In addition to the objection which I suggested this morning against this amended answer, I wish to call attention to the fact that the complaint in this case is sworn to and that the amended answer tendered is not sworn to.

After argument

75 Mr. CHILDERS: We will have it verified.

The COURT: They can fix that up.

Mr. FIELD: I do not know whether they can or not; I do not understand that inconsistent defenses can be interposed.

The COURT: I should allow *them* to have it sworn to and you can save your point.

Mr. FIELD: I want it sworn to.

The COURT: I suppose you can state who will swear to it, or Mr. Marron can attend to that, and I will hear what Mr. Field has to say about the other proposition.

Mr. FIELD: I had not intended to enter upon any discussion; I want to save this question and I now desire to make up the issues in this cause. The first motion which I desire to submit in connection with this pleading is a motion to strike out a part of it. The motion is in writing.

Thereupon argument is had.

The COURT: That is offered in response to your suggestion as you left the court house this morning.

Mr. FIELD: That is not all I propose to offer in resistance of it.

76 The COURT: I merely want to find out: When the court adjourned that was not in the offer; now it is.

Mr. FIELD: This is an attack upon the legal sufficiency of this allegation to support a verdict in favor of the defendant, if it were in and allowed. It is in the nature of a demurrer to a part of this amendment which your honor has admitted.

The COURT: Has that been filed or merely offered?

Mr. FIELD: This paper—he has filed and is about to have his client swear to an answer—

Mr. CHILDERS: The amended answer as proposed, is in writing.

Thereupon argument was had on the motion to strike out.

After argument

Mr. CHILDERS: We ask leave to put in the words "if any" in the amendment.

Mr. FIELD: I want it sworn to after the answer is all complete.

The COURT: I think you better put in "if any was made which the defendant denies."

Mr. CHILDERS: Yes, I will put all that in—"If any promise was made, which the defendant denies."

77 Mr. FIELD: Now, I want to submit to your honor that the answer as changed, gives the defendant (plaintiff) no information. I wish to arrange my motion to strike this out as amended

on the same ground as stated in the motion made. What I want to find out is whether or not this paper is to stay in or go out, with an exception on the record from my client, if it is to stay in.

The COURT: I think I said at the time of the hearing that it seems to me that everything was alleged to have happened on the second of January, but perhaps that was not the meaning of it after all.

Mr. FIELD: My view of that at that time, I clearly expressed to your honor, and was that the defendant knew whether or not it made a promise and it could have admitted or denied. If it denies it made any promise at all, the date would be no aid to it whatever.

Mr. CHILDERS: That was before we made any answer whatever; the time that ruling was had there was no answer filed.

After extended argument:

Mr. CHILDERS: We have the answer as amended written out and ready to be sworn to.

Thereupon the amended pleading was duly sworn to.

The COURT: The motion to strike out, I will overrule.

78 Mr. FIELD: To that action of the court, I save an exception. Now, I desire to file a motion to make that part of the answer more definite and certain.

Which said motion is in writing and filed.

After argument.

The COURT: I will overrule it.

Mr. FIELD: I except. Now, I wish to file a reply to the amended answer. It is a mere traverse.

The COURT: Now, are we ready to try the case?

Thereupon the jury resumed their seats in the jury box.

Mr. FIELD makes an opening statement of the plaintiff's case to the jury.

*Plaintiff's Case in Chief.*

JOSEPH SCHMITT, the plaintiff, being first duly sworn, testified in his own behalf as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Joe Schmitt.

Q. What is your age?

A. Between 34 and 35.

Q. What is your business?

A. A brewer.

Q. How long have you been a brewer?

79 A. About 21 years.

Q. Where were you last engaged as a brewer?

A. In the Southwestern Brewery & Ice Company in this town.

Q. For how long were you engaged—employed by the Southwestern Brewery & Ice Company?

A. About 10 years.

Q. How were you employed on the second day of January, 1906?

A. To fill my position as brewer and brew the beer for them what I got instructions for to do it.

Q. Now, who was your immediate superior in the work of the brewery—from whom did you get your orders?

A. From Mr. Henry Loebs, the general foreman of the South-western Brewery.

Q. Now, Mr. Smith, describe to this jury in detail just exactly what your duties were in brewing beer, describe the implements with which you made the brew and begin at the beginning of the transaction and go through to a complete brew?

Q. I want you now to tell the jury not about any particular time what appliances there were there provided by the brewery for you and what you had to do with them in order to brew beer. I want the jury to see a picture of that transaction as you were at work at it?

A. It was about in the middle of April, 1905, when Henry Loebs put me onto this brewing part. He went along with me for three times for to show me how to set the safety valve—the steam valves and everything. After that, he asked me if I can make a brew myself and I says, I guess so, I can.

Q. Now, without regard to whether you were going to make a brew or anybody else, I want you to describe to the jury what apparatus there was there for brewing beer and how it was used, without regard to your case now; I want you to describe that apparatus?

A. Well, it was on the 2nd day in January—

80 Q. Mr. Schmidt, if you do not understand the question, I wish you would say so.

The COURT: He wants you to show how it was done. Not that morning, but how it was done.

Q. I want you to describe the cooker and how the cooker is attached to the boiler, and how you got steam and what you had in the cooker, and now entirely without regard to any particular time?

A. Well, there is between 18 and 19 barrels of water in the kettle, 1,400 pounds of grits. First they run in 500 pounds of malt, and raise is up to 40 degrees Reaumur.

Q. Now, please describe to the jury what it is you put this in?

A. In this kettle.

Q. The jury do not know anything about it; tell them what it is like?

A. Well, it is an iron kettle supposed to have pressure. I performed my duties—the work on this kettle the same as all the time.

Q. Did this kettle have a top and bottom and a safety valve and pipes to connect it?

A. Yes, sir.

Q. Will you describe those to the jury?

The COURT: Mr. Schmitt, you must remember that probably

many of the jury were never in such a case as this; tell how you did it and what you did with it.

Q. I want them to see all these things from your description and then tell about how you worked it?

A. It is an iron kettle, with a water connection on—a steam coil on the inside supposed to heat the mash with. After this stuff is raised to certain degrees you know they have to lock off the man hole.

81 Q. What is the man hole?

A. Have to run the stuff into it.

Q. Now, if there is anything else tell about it?

A. There is a safety valve on there—a steam gauge—a thermometer, to show me the degrees you know, and it been show to me—

Q. Was there a grinding apparatus?

A. Yes, sir; a sterring gear—(Witness speaking broken English, the stenographer was unable to define the pronunciation of the word sterring absolutely, and it may have been stirring instead) on the inside to keep the mash agoing.

Q. Where did you get the steam?

A. Through steam pipe, through steam out from the boiler house about 60 or 80 feet away from the brew house.

Q. How did you regulate the volume of steam?

A. Through a valve on the outside of the cooker.

Q. Then did it have steam valves connected with it, too?

A. Steam valves—that is one steam valve on the outside of the cooker.

Q. Well, now describe to the jury how you charged that cooker, what you put in it?

A. Now, you want me to describe the brewing: How I made the brewings?

Q. Yes?

A. Well, the water we generally pump in a day before—in the mornings—the first thing—we start the machinery—the gear—start the sterring machine—then you run down the malts what is laying in reserve for the certain brew—then turn the steam on and raise it up to 40 degrees Fahrenheit, then you take 15 to 20 minutes time to raise it up—now,—it is 40 degrees—then you run your grits down—raise it up—then you close up your man hole—air tight.

Q. Air tight?

82 A. Yes, sir—then raise it up to 45 degrees—to 54 degrees I mean—then let it rest for half an hour and raise it to 56—then turn the steam valve—it was half inch steam valve on the cooker—underneath—keep tight the main valve into the mash tub—keep it from clogging up—gets hard like a rock—keep out the grits and malt from stopping it up so you can run the stuff out.

Q. Is that the valve which lets steam in?

A. Yes, sir.

Q. And the only valve there is?

A. There is another one connected on top—the main valve—it is on the side about a foot above the bottom, inside, in the tank.

Q. Now, how did you get—by what agency did you raise the temperature to 40 degrees?

A. To get it to turn in the starch, what is supposed to be—they won't understand it—it is a chemical.

Q. Will, you tell them about it?

A. To get the starch so it turns into sugar, then you manufacture the beer out of the material—you make the beer out of it.

Q. When you talk about 40 degrees, you talk about 40 degrees of heat do you not?

A. Yes.

Q. What furnishes that heat?

A. The steam.

Q. Now, can you tell the jury from your experience with that machinery, what amount of steam pressure was required to furnish 40 degrees of heat?

A. Well, I do not know, I did not figure it out yet, but I done according to instructions of Mr. Loeb as he showed me that before; he showed me that three times, he was with me.

Mr. CHILDERS: I move to strike that out as not responsive.

The COURT: I think it was responsive; that he didn't get at it by the amount of pressure but by what he was shown.

83 Q. You say there was a steam gauge on that cooker?

A. Yes, sir.

Q. State whether or not it was part of your duty to watch that steam gauge all the time?

A. Well, this 40 degrees, that won't raise any pressure yet: After the mash is 50 degrees—

Mr. CHILDERS: I do not think that is responsive.

Mr. FIELD: I think it is responsive to the former question.

The COURT: I think so. He said it would not make any pressure—I think he said at 43 degrees.

By COURT: Did you say 43 degrees or 40 degrees?

A. 40 degrees.

By COURT: You say that would make no pressure at all?

A. No, the kettle is open at that time.

Q. Now, go on?

A. After I open this valve, to clean out this main valve—to keep it clean—I went upstairs, turned my valve on the way Mr. Loeb showed me how many times it takes exactly so I get a certain number of degrees out of it and raise the mash up to boiling point, then raise the safety valve so it won't be stuck, and after I had it raised I walked underneath and shut that half inch steam valve—after I reach under, only to shut it off, and as I went to turn around, the mash came down over me and that was the last of it—what I know about it.

Q. Now, Mr. Schmitt, I have not asked you to tell about what took place on any particular day: I have asked you to describe the general method of brewing beer, when you

first commenced to use that cooker, under what pressure did you brew?

A. Under 20 pounds of pressure. That is after we had this big weight—was hanging on there when Mr. Loeb's was with me—that is the last of it—it blew off at 20 pounds—could not reduce it any more.

Q. When was that?

A. That was in the middle of April, 1905.

Q. You say that this particular weight is the weight which held down the safety valve at that time. (Exhibiting iron weight to witness)?

A. Yes, sir.

Mr. FIELD: I offer that weight in evidence.

Mr. CHILDERS: We object to it because it was used in 1905 and is not the weight used when this accident is said to have occurred.

The COURT: Objection overruled.

Mr. CHILDERS: Exception.

Which said weight is referred to as Plaintiff's Exhibit No. 1.

Q. Who provided this cooker for you?

A. Mr. Henry Loeb's.

Q. Who owned that apparatus?

A. The Southwestern Brewery & Ice Co.—Henry Loeb's is the general foreman.

Q. Who was the President of the company?

A. Mr. Jake Loeb's.

85 Q. Now, in the course of your dealings with that cooker and in the performance of your duties for the Company, did it or not, at any time, ever become necessary for you to reduce the pressure?

A. Yes, sir.

Q. When and why?

A. Two months afterwards.

Q. March 2nd—previous to April, 1905?

A. Yes, sir.

Q. What did you do about it and why was it necessary for you to do it?

A. The kettle commenced to leak and I called Mr. Henry Loeb's attention to it, and first when I told him, he says, the kettle has been leaking before—it is not so bad—taint so bad—I worked for another month, I think it was—I called his attention to it again—it commenced to leak more—you have to look at it and see what is the matter with it—well, we could not see any leakage from the outside, because the tank was setting on a wooden floor.

Q. Well, what did you do?

A. After I asked Mr. Henry Loeb's if I should take the augur and bore a hole out and cut the wooden floor out, so I could see what is the matter with it—I could not hardly saw it—the sour mash came down on top of me, already—I went inside the kettle—took a light in with me and looked around to see if I could not see anything and when I looked around, I see the light come through

from the daylight from the bottom. I called Mr. Henry Loeb and Mr. Abel, engineer,—was in the brew house at the same time—I showed it to Mr. Loeb. I asked him—I told him I cannot make no beer that way—I asked him what he is going to do about it. He told me that—middle of the summer time—the business is rushing—we have to fix it the best way it goes. I asked him if I should put on an iron plate—

86 Mr. CHILDERS: I object to it.

A. With a piece of packing on top and a bolt through and screw it on tight. He says I should do it.

Mr. MARRON: Mr. Loeb told him to do that?

A. I asked him if I should do that and he said yes.

Q. Well, now go on?

A. I have got a man Mr. Nick Trujillo, who helped me to put it on. After I had it on, I told him I want to try it, if it holds.

Mr. CHILDERS: We object to that, what he said.

The COURT: What he said to Loeb?

Mr. CHILDERS: That is not what he said to Mr. Loeb.

Mr. FIELD: I think it is to Mr. Trujillo: I do not see how it makes any difference.

The COURT: What he said to Trujillo unless Mr. Loeb was there?

A. No, Mr. Loeb helped me to put the patch on.

By COURT: Whom did you tell that to?

A. Mr. Loeb was in the brew house—I pumped water in and it didn't hold. I asked Mr. Henry Loeb what I should do about it? He told me I should take it off and put white lead on top of the packing—it might hold then. And when the kettle gets hot and the white lead gets hot, it will tighten itself onto the kettle. I done so, and it was all right—I brewed with that till Mr. Henry Loeb calls the boiler maker—

87 Q. Well, let me ask you before you get away from there, was anything done with reference to changing the pressure?

A. No, sir; never been anything said since, since I was brewing on that kettle, since I had hold of it.

Q. Now, Mr. Schmitt, you said that after you had brewed with 20 pounds pressure, you changed and reduced the pressure?

A. I asked Mr. Loeb—or I told him—I told Mr. Loeb, we have to take this pressure off, it is too much, and I am afraid I am going to get hurt; then I put this other valve on that won't raise more than 12 pounds.

Q. Now, when was that with reference to the time that the patch was put on?

A. It was about two or three weeks afterwards—I had that patch on.

Q. When was the patch put on, now?

A. It was about in June, I think.

Q. June of 1905?

A. Yes, sir.

Q. Then you say this is the identical weight that was used?

A. Yes, sir.

Q. And you say that with this weight, the boiler was incapable of taking a pressure above 12 pounds?

A. Yes, sir, they will use this weight here tomorrow morning to make beer, the same weight.

Mr. CHILDERS: I object to that and move to strike it out.

The COURT: It is stricken out.

88 Mr. FIELD: I offer this weight in evidence. It has a 4 on it.

Which said weight is referred to as Plaintiff's Exhibit No. 2.

Q. After the weight identified by a No. 4 on it, was put on—how soon after the patch did you say it was, three or four weeks?

A. Three or four weeks, yes sir.

Q. Was there any other change made in the pressure?

A. No, sir.

Q. Were you using the weight which is marked with the Number 4 on the day of the accident?

A. No, sir.

Q. You say—

A. I put another patch on before—I am not through yet with this, Mr. Field.

Q. I beg your pardon, go and state about that?

A. I used this weight for about—it was on there yet when the boiler maker took the measure of the bottom.

Q. Now, when was that, that the boiler maker took the measure of the bottom?

A. I do not know; it was in the October or in the November, something like that—I guess they can explain that.

Q. Now, go on and tell about that other patch that you say was on?

A. In the meantime, the cooker got another bad place, about four feet away from the old patch. This bad place was near on to the shelf from the cooker, so it could not hardly be repaired. When it commenced to show bad, I called Mr. Loeb's attention to it, and he told me—another kettle, the bottom is ordered already for it, and we was short on beer at the same time. He said, we have to brew a couple of times more, by the time they have the bottom

89 ready, and the same time he told me, go ahead and fix it like you did the other way. I fixed it and it held for about four times before the accident happened, and it was the brewing before the accident—I asked Mr. Loeb's if they have fixed this thing. He said, yes, you know, pretty well, that the order is taken for it already; it ought to have been fixed already, but they have the delay on the iron, I suppose is what I heard afterwards—that is the reason I worked under there; it was not my intention to get hurt, and that valve, I reduced that and I told Mr. Loeb's, I am going to reduce the pressure again, because it showed that bad place—I hang that valve on there—it was hanging on the morning when the accident happened. I got Mr. Loeb's to hand it over to the rest of the workmen—

The COURT: That is another weight, I suppose?



Q. When was this?

A. That was three or four weeks before the accident happened. I showed it to Mr. Loeb—I am afraid I get hurt—I took that second one off and put on this one, so as to have but little pressure on.

Q. Now, how much pressure would the boiler hold with this weight on—the safety valve?

A. This valve—this weight blows the safety between five and six pounds—blows it off entirely—discharges it.

Q. Then I understand you, it was impossible to have a pressure exceeding six pounds with this weight on the safety valve?

A. Yes, sir.

Mr. FIELD: I offer this weight in evidence, which is a circular wheel with six spokes and a hole in the center of it.

90 Which said weight is referred to as Plaintiff's Exhibit No. 3.

Q. If you had any conversation with Henry Loeb in relation to that boiler and its condition on the first day of January, 1906, tell the jury what it was?

A. Yes, sir; I have; Mr. Loeb went upstairs and changed his shoes—he worked only half a day that day—it was New Year's—the same time I pumped the water in, and I asked Mr. Loeb that question what I told you a little while ago, if that kettle ever get fixed, and he answered me the same way back again.

Q. Well, what did he say?

A. That it ought to have been fixed already—it generally takes two or three, or four months before we have got something done down in this foundry—that is what he replied to me.

Q. What, if anything, did he say with reference to using it again?

Mr. CHILDERS: We object and insist that the conversation be asked for—that the witness state the conversation without suggesting it in the question. It is a very important conversation.

The COURT: I do not know that he stated all or not. He can be asked to state anything more that was said, certainly.

Mr. FIELD: Does your honor hold that he cannot be asked this question?

The COURT: I think the question is leading in form and I will sustain the objection.

91 Mr. FIELD: I will except.

Q. Have you stated all that was said between you and Henry Loeb on the first day of January about fixing the boiler?

A. That was about all.

Q. Have you stated all that was said between you and Henry Loeb about using the boiler afterwards?

A. Well, he asked me—what he generally done every morning—the day before we brew—the evening before I went home—you are going to be here on time tomorrow morning—that is all what I know.

Mr. FIELD: Now, the difficulty under which I labor, the Court please, is this: The witness has made a full statement before and has

attempted to repeat it and has not repeated it all, and the record will show it.

The COURT: I got the impression that he had two talks with Mr. Loeb on the first day of January. Perhaps I misunderstand it.

Q. Did you have more than one conversation with Henry Loeb on the first day of January?

A. Not with reference to any business that I remember.

The COURT: I misunderstood him, I suppose; the question is whether you told all that was said between you in that conversation.

Q. Have you told in answer to the last question all that was said between you and Henry Loeb at that time?

A. Now, that is—that I think is the whole conversation we had that morning.

Q. Will you repeat it?

92 A. I can repeat it; yes, sir.

Q. Well, do?

A. When Henry Loeb came in the brew house and went upstairs, he took his shoes off—changed his shoes—I was pumping the water for the next day brewing and I was standing on the valve, when he went up and I asked him, what if this kettle is ever going to get fixed—he says, that I know that it is ordered already and it ought to be fixed long ago, and when he went down, he asked me, will you be here on time tomorrow morning—he generally said that every time.

Q. State whether or not you knew when you started to make that brew on the 2nd day of January, 1906, that that boiler was in a dangerous condition?

A. Well, it did hold the brewings before—the other brewings before and I thought it would hold this one, too. I did not expect it would have any explosion on there before it would ever be fixed—I watched it close—tended to my duty the way I did all the time.

Q. Well, I will ask you definitely the question, whether or not on the 1st day of January, 1906, Henry Loeb said to you that he wanted you to use it one or two more brewings?

Mr. CHILDERS: I object to that. The witness has stated the whole conversation. That is certainly suggestive and putting the words in his mouth.

The COURT: I understand the rule to be that after a witness has stated definitely that he remembers no more of the conversations, he can be asked as to particular things.

Mr. CHILDERS: He stated he remembered the whole conversation and could state it, and proceeded to state it.

93 The COURT: I do not understand, Mr. Field, that you have put the witness in the position that it requires, that is that he should say definitely that is all that he remembers of the conversation.

Q. Have you stated all that you remember of the conversation with Henry Loeb?

A. Yes, sir; that is all that we talked about.

Q. State whether or not on the first day of January, Henry Loeb

said to you, that he wanted you to use that boiler for one or two more brewings?

Mr. CHILDERS: I object to that as leading and suggestive.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. Yes, sir.

Q. Now, state whether or not, you would have used that boiler, if you had not relied upon his promise to have it fixed?

Mr. CHILDERS: I object to that as leading. That is one of the main points in the case. The plaintiff's case rests upon it.

The COURT: I think it is leading. I think he can tell why he went on using it. I think the question is leading in that it seems to suggest what he should answer, but I think he can tell his reasons for going on and using it longer.

Mr. CHILDERS: The objection is sustained, then?

94 The COURT: Yes.

Mr. FIELD: I except.

Q. What, if anything, Mr. Schmitt, induced you to continue the use of that boiler and to attempt to brew with it on the 2nd day of January, 1906?

Mr. CHILDERS: Objected to as irrelevant, immaterial and incompetent.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. Well, I cannot say nothing about it.

The COURT: Did you understand the question?

A. Why, I—

The COURT: The stenographer can read it again; perhaps he would understand it, if you asked him why—the word induced may not get into his head.

Mr. FIELD: Of course, English is a foreign language to him, and he is not familiar with the terms or forms of expression in which your honor and I exchanged ideas.

The COURT: I think you had better change the question.

95 A. I went under there according to instructions of Mr. Henry Loeb. He told me I shall use it. That is the only thing I can say about it.

Q. You would have followed Mr. Henry Loeb's instructions and gone under there and been burned, if you had known you were going to be burned?

A. No, sir; I would not.

Mr. CHILDERS: I object to the question and answer, and move to strike them out as immaterial, irrelevant and incompetent.

The COURT: I do not see how it is very material. It would seem to be taken for granted that a man would not go into a trap—

A. No, sir; I would not gone in there if I had known that I was going to be hurt—nobody would do it.

The COURT: I do not know whether Mr. Childers cares about that or not.

Mr. CHILDERS: That answer I have no objection; I think that is simply the law of self preservation.

The COURT: Then we will leave it there.

Q. State whether or not the statement of Loeb to you, that the bottom was ordered for the boiler and that it ought to have been fixed before that, and that he only wanted you to use it for one or two more brews, had anything to do with your using the boiler on the second day of January?

Mr. CHILDERS: I object to that question as leading and suggestive and incompetent and upon the further grounds that it is not in accordance with the answer of the witness as to what Loeb told him, Loeb told him he wanted him to go on and make two or three more brews.

The COURT: I think it ought to conform to what he said.

Mr. FIELD: I think he said one or two.

A. Yes, sir; I can prove it, too.

The COURT: I think I will allow the question as it now is.

Mr. CHILDERS: I except.

Q. (Repeated.) State whether or not the statement of Loeb to you that the bottom was ordered for the boiler and that it ought to have been fixed before that, and that he only wanted you to use it for one or two more brews had anything to do with your using the boiler on the second day of January?

A. You want me to answer that?

Q. Yes?

A. Well, didn't have any particular to me—I had no idea that it will explode because it was holding before and same time I thought it would hold this time too, until the bottom gets fixed—what is I told you before.

Q. Then the fact that he promises to have it fixed, didn't have any influence on you at all.

97 Mr. CHILDERS: I object to that. If I understand the witness's answer, he means to say that he didn't make any particular promise.

The COURT: I do not understand it that way, but that it didn't have anything particular to do with it.

Mr. FIELD: I want to know that the witness understands the question.

The COURT: I suppose you can hardly cross-examine him to get at that; I will sustain the objection.

Mr. FIELD: I except and I offer to show by the witness in response to this question, that he would have continued to use that boiler but for the promise of Loeb to have it fixed, and except to the refusal of the court to permit me to do it.

The COURT: I did not refuse that: I refused to allow you to ask that question.

Q. Will you state to the jury, Mr. Schmitt, whether or not the promise of Mr. Loeb's to have that boiler repaired was believed by you?

A. Yes, sir; I took it for that, the kettle gets fixed, so nothing will happen, or that I get hurt by it—that is what I took it.

Q. Now, state whether or not you believed Mr. Loeb was doing what he could to get it fixed?

A. I believe he done what he could to get it fixed.

Q. Now, state whether or not you used it on that day relying on his promise that he would have it fixed?

98 A. I would not have used it, if he would not have fixed it, or if he would not have promised me to have it fixed.

Q. Now, describe to the jury exactly what happened on that 2nd day of January, 1906, from the time you went to work?

A. Well, that morning, I started to brew about five minutes after five o'clock in the morning. The fireman Manuel Sedillo was there raising the steam for me. When I came, he came over in the brew house and started the engine for me—the steam engine for me, as much as I can remember. After I had all the steering gears in motion inside of the tank, I commenced to brew like any other time—You want me to explain that over again?

Q. Just what happened that morning; confine yourself to that day?

A. Well, I raised my mash to the certain degrees what I have got shown the day after I commence brewing—when the time come—certain time—I open the steam valve underneath the cooker—for it has been put on there for the purpose of cleaning out the main outlet for down into the mash tub.

Q. Now, I do not think you have ever explained the connection between the cooker and the mash tub; I wish you would do that right now?

A. There is a four-inch outlet in there in the kettle—four inch outlet nipple—screwed in below there is a cross and dividing—one inch for the washout, the other one is for the sprinkler (or sparkler) connected inside to the other sprinkler in the mash tub; below that is a half inch steam valve connected into that nipple for keeping out for cleaning or keeping clean—you turn steam on to keep the valve clean from being crowded or blocked up—so after the mash is ready above, so I can let it down into the mash tub.

99 The COURT: How high is the bottom of this cooker above the floor—the ground where you stood when you were—

A. About three feet.

The COURT: Is the mash tub right under it, or on one side?

A. On the basement, on the bottom floor, right underneath it.

The COURT: What is the diameter of the mash tub as compared with that of the cooker, larger or smaller?

A. Well, it is larger.

Q. That is the mash tub is larger?

A. Three times larger than the cooker.

Q. Larger across?

A. Yes, sir.

Q. Now, there is one other thing you have not made clear, that is the purpose of this steering gear, or stirring gear; if that stirring gear would not work what happened?

A. Well, that is not the proper name for it—stirring gear.

Q. Well, stirring gear?

A. To keep it from setting on the bottom.

The COURT: By the bottom, you mean the bottom of the cooker?

A. Yes, sir.

Q. Well, it would burn too, would it not?

A. No, it would not burn, that brewing of beer would have been spoiled.

Q. Now, go ahead.

A. After I had this turned on—the steam—I went above  
100 on the next floor—turned on the main steam valve for the mash—for the rice cooker—raised it up to 68 degrees—couple up the stirring apparatus for the mash tub—after it was in motion, I pulled the slide out—the stir runs out in the receiving tank—the meal hopper—what is the malt is ready for to mash into the mash tub—after I had it done, I went up—up stairs—fixed the hopper then I went down stairs and took the water hose and rinse the malt what is hanging around—the way Mr. Loeb showed me to do it and went up stairs again and walked behind the cooker; got the ladder and put it on the cooker and go up and raise the safety valve. Between that time the mash raise themselves up to about 83—84 degrees—I cannot remember which degree it was. I walked underneath of it—shut that little valve off again—I was ready to turn and walk away—and the mash came down on top of me and that is the last of it what I know about it.

Q. Do you mean to say that when the mash came down you lost consciousness?

A. Well, I can't remember anything. I do not know who took me up. I know nothing else. I was about gone.

Q. How were you injured, Mr. Schmitt?

A. When it came down I had a little—regular work cap on—when it came down it blowed that off—the whole stuff went right on top of my head—I had my hands right on the mash tub—on top and I have got scared and I ran away and the board—I ran away on was only eleven and a half inches broad and I must have lost my balance and I fell down. I fell down somewhere and before I got up the thick mash got enough on the floor that I got my hands pretty near scalded up and this side of the face mostly.

Q. Any other place?

A. The knees—before I got up I got the knees on the floor, on this side (indicating).

101 Q. One or both?

A. This knee not so bad—when the mash came down—what faced me—that is the reason I was scalded back here.

Q. Is the present condition of your hands a result of that accident?

A. Yes, sir.

Q. Show them to the jury?

(Witness steps to the jury box and exhibits his hands.)

A. Nails and everything came off. I can do a little bit of work, but not much——

Mr. CHILDERS: We do not want that. We object to that. Mr. Schmitt is just to show his hands to the jury.

Q. Do not say anything more, Mr. Schmitt. Q. What were you able to earn at your trade as a brewer?

A. \$21 at that time.

Q. Is that a week or a month?

A. A week, six days.

Q. State whether or not in the present condition of your hands your capacity to work at your trade is impaired and if so, to what extent?

A. No, sir; I cannot——

Q. To what extent can you work at all, Mr. Schmitt?

A. Well, I cannot do any heavy work. I cannot work in the cold storage any more.

Q. Why can you not work in cold storage?

A. Because, I have to work in the water and my hands freezing.

Q. Do we understand that your hands are much more sensitive to cold and heat than they were before?

A. Well, as soon as I get my hands wet they commence to swell and they commence to crack, and if I do a little work, the  
102 blood runs down on my hands.

Q. Now, I wish you would describe a little more fully the immediate result of this scalding on your hands and on your face and hair?

A. Well, generally, when the weather changes, I gets pain——

Q. No, that is not what I want: When it happened, if the skin came off and the hair came out?

A. Well, I was not with myself—from the time I got hurt—I do not know what happened afterwards.

Q. There was a time when you commenced to know what was happening?

A. I do not understand that.

Q. Well, when did you get so you knew what was going on around you, after the accident?

A. (Not answered.)

Q. Do you know you were in the hospital?

A. I did not myself, but what I heard through hearings.

Q. You know when you left the hospital?

A. I believe it was on Sunday, but I cannot swear about it—that I know about it very much.

Q. Well, when you left the hospital, where did you go?

A. They took me to my sister's house.

Q. How long did you stay there?

A. Four weeks.

Q. Well, it is said that you were in the hospital six weeks and five days—never mind, I will fix that date later—When you were taken to your sister's house did you know what was going on then?

A. I can remember a little, but not much.

Q. How long was it after the accident happened before you were able to dress yourself without assistance?

A. That was over three months.

Q. Now, have you told the jury all of the effects which you feel from that accident, say at this time?

103 A. Well, I cannot work any more like I ought to, because my hands are stiff. I cannot take hold of anything any more. I cannot hold it tight. Of course, I cannot close my hands. My fingers are stiff and generally when the weather changes—my head and my body feels like I have a thousand needles in my hands and commence to pull this way—the cords.

Q. What, if any difficulty, did you experience about sleeping at night?

A. Well, it bothered me a good deal and in the morning generally when I wake up, mostly my little finger and this one here—they feel like paralyzed.

Q. Well, when these conditions exist, do you feel pain?

A. Well, yes sir.

Q. To what extent?

A. They feel so much that I cannot sleep much at nights.

Mr. FIELD: That is all.

Cross-examined by Mr. CHILDERS:

Q. Mr. Schmitt, you say you had been 21 years in the brewing business and are between 34 and 35 years old?

A. Yes, sir.

Q. And ten years of that time you have spent in the Southwestern Brewery & Ice Plant?

A. Most of the times, yes sir.

Q. Prior to your employment by the defendant, where did you work in the brewery business?

A. I worked in the cellar most of the times.

Q. What breweries; where were they located?

A. In this country.

Q. Just before you worked for this company, what company did you work for?

A. Before I commenced to work in this brewery, I worked  
104 for no other brewery, except in the old country—I learned my business as a boy from 13 years of age.

Q. And you worked in breweries in the old country from the time—till you came to Albuquerque?

A. No, sir; I worked in Brooklyn, N. Y., two years before I came out in this country.

Q. Where else in the United States?

A. Two years and a half in Brooklyn. But not in a brewery.

Q. Then, except the two years and half that you worked in New York, since you was 13 years of age, you have been working in a brewery?

A. Yes, sir.



Q. Before you worked in Brooklyn, New York, you worked in the old country?

A. Yes, sir.

Q. Now what was your business in the breweries in the old country; what did you do; did you understand the business generally?

A. I guess you must understand me wrong. If I learned the business I have to go through everything that belongs to the brewing system.

Q. Every branch of it?

A. Every branch of it, yes sir.

Q. You learned that in the old country and knew that before Henry Loels had you to locate in Albuquerque?

A. Yes, sir.

Q. Then you had made malt in the old country—cooked it?

A. Yes, sir.

Q. How many years were you engaged in cooking malt?

A. Where, this country or the old country?

Q. This country or the old country?

A. About till I came to this country from 13 years of age till I was 19 and a half when I left the old country.

Q. All that time engaged in cooking malt?

105 A. Not cooking malt alone—in the general brewing departments—different departments all round.

Q. Is there any difference in the way—in the kind of kettle they use for cooking malt in the old country and in this country?

A. Yes, sir, entirely different.

Q. Are the systems practically alike?

A. Well, they use different apparatus altogether; they use a different system to manufacture their beer there.

Q. Did they cook the malt with steam?

A. No, sir, not when I was there.

Q. How did you cook it?

A. They had it mashed up and cooked it in an open kettle.

Q. Then, as I understand you, you never used any of these closed kettles with steam until you used this one here in Albuquerque?

A. That was the first kettle I ever used.

Q. Now you went to work with that kettle in 1905, I believe you said?

A. Yes, sir.

Q. You worked for the brewery 10 years in all?

A. Yes, sir.

Q. Then you commenced ten years from—what was the first year you worked?

A. I worked about seven years for the brewery.

Q. What did you have in the way of employment with the brewery?

A. I commenced to work for the Southwestern Brewery & Ice Company in June, 1907—1897.

Q. When did you leave the employment of that company?

A. I never left it, except I laid off, except the times I quit once and came back and got employment again.

Q. Are you still in the employment of the company?

A. I quit twice.

106 Q. Are you still——

A. No, sir.

Q. When did you leave it the last time—when did you leave the employment of the brewery the last time?

A. The last time about two months ago.

Q. You didn't leave the employment of the company while you were suffering from injury, but you were simply not at work?

A. Well, I believe I would never have worked for the brewery any more, but Mr. Jake Loeb and Mr. Marron bothered the life out of me to come back to do the work for them.

Q. After you got out of the hospital and recovered, you went back to the brewery, didn't you?

A. Yes, sir.

Q. Now, when did you return to the brewery to work after your injury?

A. It was, I believe in June.

Q. In June, 1906?

A. Yes, sir, I think so, 1906.

Q. Then from January to June you were not working at the brewery?

A. No sir, I could not because I was hurt.

Q. Then, when you did go back there, what kind of work did you do?

A. What I could do.

Q. What did you do?

A. Mr. Loeb——

Q. What did you do?

A. Work in the brew house again.

Q. What were you doing in the brew house; what kind of work?

A. Made beer again, as much as I could—I had help with it.

Q. You made beer in this same brew house?

A. Yes, sir.

Q. Was it the same kettle?

A. The same kettle, yes sir.

107 Q. And you said you had help; what kind of help did you have?

A. Mr. Loeb told me I should do as much as I can and if I cannot do the work, he wants to give me men to help me, so I can be there, so the work is to be done as it ought to be done, because he knows I am the man for him to do the work right.

Q. What kind of help did you have?

A. The engineer helped me once in a while and the fireman. Those are the only people who was there at that time.

Q. Then no extra men were employed to help you, but you simply called on them to help you, when you wanted them?

A. Yes, sir, Mr. Loeb asked me—he told me, if you need help, you call on these men over there—they have not much to do.

Q. On October 10th, didn't you state to Jacob Loeb and Henry Loeb and the other people around there in the brewery that you didn't need any more help; that you were just as good as you ever were—October, 1906?

A. I like to know who said that thing—not me.

Q. Just answer the question.

A. I said no.

Q. You said you didn't say it, or you don't think you said it?

A. No, sir, I did not—I do not think I did say it, because I know I cannot do it and everybody see I cannot do the work I did before.

Q. Without giving any reason for it, did you say it or not?

A. I do not think I did say it. I do not think so; not if I can remember.

Q. Now, you commenced work first in making malt—cooking malt in that kettle in June, 1905?

A. When?

Q. June, 1905?

A. No, sir; it was in the middle of April, 1905.

108 Q. Middle of April, 1905?

A. Yes, sir.

Q. You say that Henry Loeb helped you brew three times; did he?

A. Yes, sir; he was with me about three times and showed me how to set the valves and regulate and run the machinery.

Q. And between that time and the second day of January and the second day of January, 1906, nobody showed you anything about it?

A. No, sir.

Q. You understood all about the steam pressure, the valves and how to put on a certain amount of steam, the temperature you had to have and how to make it?

A. Yes, sir.

The hour of 5:30 having arrived an adjournment was taken until tomorrow morning at 9:30 A. M.

And now, pursuant to adjournment the trial of this cause proceeds.

Cross-examination of JOSEPH SCHMITT resumed:

Q. You say you got all your orders while you were engaged in your business with the brewery company from Henry Loeb?

A. Your honor, if I may ask a question—I am not very posted in the American language and I can hardly understand Mr. Childers' question, you know, and I would like to ask for an interpreter.

The COURT: When there is any particular question, say so and it will be explained.

Q. You understood Mr. Field's questions yesterday, did you not?

109 A. I cannot understand your questions very much; at the same time I have made my best to answer the questions without any trouble—I do not want to get into any trouble.

A JUROR: Could a member of the jury have a right to ask him some questions so we could get a correct answer?

The COURT: I think we will have to attend to each case when we come to it. If you do not understand what the witness says, of course, you can ask.

A JUROR: I thought if another party would ask the question in simpler words, it would help.

Mr. CHILDERS: I submit to the Court and the Jury that the questions I ask are expressed in about as simple language as can be.

Mr. FIELD: I think Mr. Gleason (Juror) meant to ask in German. Is that what you meant, Mr. Gleason?

JUROR: No; I cannot speak German.

Mr. CHILDERS: If the witness does not understand the question at any time, and if it becomes necessary, I will try to make him understand it.

The COURT: Well, go on.

The WITNESS: I beg your pardon, the kind of question you put against me yesterday, I could not understand; I could not  
110 have the least idea what you mean. It makes me rattled and I must just say something wrong—that is just entirely the wrong way.

The COURT: This particular question, Mr. Witness, did you understand it?

Q. (Repeated.) You say you got all your orders while you were engaged in your business with the brewery company from Henry Loeb's?

A. Yes, I had before the accident happened; not after.

Q. From whom did you get your orders after the accident happened?

A. Mr. Jake Loeb's.

Q. That was after you returned in the employment in the brewery company in May, 1907—you went back to the brewery—to work at the brewery in May, 1907?

A. I did not.

Q. As a matter of fact, was it not in May?

A. No, sir; it was in June, I said, I guess you will see that.

The COURT: June of this year, do you mean?

Mr. CHILDERS: 1906.

A. Yes, sir, 1906.

Mr. CHILDERS: I simply made a mistake in the date.

Q. After Henry Loeb's put you on the brewing job in  
111 April, 1905, he went, you say, two or three times with you and showed you how to do the brewing?

A. Yes, sir.

Q. After that time and until the accident happened, did he come up there and assist in doing the brewing, or did you do it yourself?

A. He is around there all the time—every time I was brewing he was looking at it if everything was O. K.

Q. He was present then every time that you brewed, up to the time that the accident took place?

A. Yes, sir.

Q. Was he there on the morning of the 2nd of January, 1906, when the accident happened?

A. No, sir; he was not there.

Q. But, upon every other occasion, every other time you brewed, except that one time, he was there?

A. He came there once in a while, but he was not there—not before seven o'clock.

Q. Now, you say that you commenced brewing this particular morning on the 2nd of January, 1906, at 5 minutes past 5 o'clock?

A. Yes, sir.

Q. The usual time of commencing was four o'clock, was it not?

A. No, sir; not in the winter time.

Q. Well, this particular morning, when you commenced to brew, how long did it take you to complete the work of brewing?

A. The brewing was not complete; that is one sure thing, because it exploded before the brewing was complete.

Q. I am not asking about this particular time; how long a time does it take to do the brewing; how many hours does it take to do any brewing, generally speaking that you did there?

A. The whole brewing?

Q. From the time you commence in the morning to brew,  
112 how many hours and minutes would it take you to complete the work of doing the brewing?

A. Takes seven hours to complete the whole brewing—takes two hours and four minutes to make the mash, according to Mr. Loeb's instructions—the process we have to go through with the mash.

Q. How much of this time is steam being used in that cooker?

A. I do not know how many steam it take. It takes the steam what Mr. Loeb's showed me exactly how to set the valve so as to get the same kind of pressure—under the pressure—the same amount of degrees and the same minutes.

Q. That is what I am asking you; how long a time, how much of that time of seven hours is it necessary to have pressure on the cooker?

A. There is no pressure on there.

Q. No pressure on what?

A. Not before the time comes—you have to raise it up to boiling—there is no pressure on whatever.

Q. There is no pressure until you get ready to it up to the boiling point?

A. Yes, sir.

Q. Now, how long did it take you to reach the boiling point from the time you commenced to brew—from the time you commenced to get ready to brew in the morning?

A. First, it takes 15 minutes to raise 40 degrees; then 20 minutes to raise it to 54 degrees; it takes 30 minutes to raise it up to 56 degrees, and it takes 15 minutes to boil—then get the mash—under the instructions I had to get the mash under pressure till the safety blow off—then reduce the pressure—the steam and let it raise—cook—I can explain it better in German—I cannot explain it better in English.

Q. I think we can understand you.

A. For half hour, then get ready to mash it in—on the lower

tank—what they call the mash tub, etc., till the mash is ready to brew, and pump it in the kettle—then go through that process  
 113 till it is ready to let it rest for half an hour—then till it comes in the tank for boiling with the hops in what they call the beer kettle.

Q. What I am asking you about — the process in the cooker?

A. That is the whole process, when it goes into the mash tub—that is the process—that is pressure up in that cooker.

Q. That is the end of that part?

A. Yes, sir.

Q. He never showed you then how to set the safety valves and regulate those other valves two or three times after he helped you to work in April?

A. Mr. Loebs was known that I was able to do this and he could depend on it that I could do it.

Q. He stated himself after being there two or three times with you and showing you that you could do it?

A. Yes, sir.

Q. And you could do it?

A. Yes, sir.

Q. As a matter of fact?

A. Yes, sir, and I done it too.

Q. And you understood how all those valves worked?

A. Yes, sir.

Q. And you knew how much steam was turned on?

A. Yes, sir.

Q. And you knew how much steam the safety—it took to blow off the safety—to pass the steam through the safety—the safety valve?

A. Yes, sir; because the weight was hanging on there and he showed me how to raise it and to tend to it, and the steam gauge showed me how much pressure it would hold till the safety blew off.

Q. And from your thermometer on the side of the cooker showed you what degree of heat you had? The degrees of heat on the thermometer?

A. Yes, sir.

114 Q. Thermometer you call it?

Q. Thero-meter you call it?

A. Thermo-meter we call it in German.

Q. Now that cooker, you state you put between 18 and 19 barrels of water in—?

A. Well, first I will answer—I want to ask you a question before I will answer it.

Q. I have not finished my question yet.

A. No, the one before—I have something to say against that.

Q. Well, go on?

A. I would like to know what is a safety valve on a boiler for—suppose that safeties blowed off itself—that is what it is put on for—for safety, ain't it?

Q. If you ask me, I so understand, but I am not a machinist or

engineer—we will get to that before I get through. You say that on that morning, you had 18 or 19 barrels of water, 500 pounds of malt, and what else did you have in there besides that at the time that the accident happened?

A. Corn grits.

Q. How much of that?

A. 1400 pounds.

Q. What was the capacity of that tank for water in addition—how many barrels of water would the tank hold?

A. That was not my business to do it. It is the brew master's business to know that; it is not my business.

Q. It is not anybody's business particularly to know it. If you know if you can say?

A. If I know, it is none of my business. It is the brew master's business; he is the man there to watch this business; it is not mine.

Q. Do you know how many barrels of water that tank held; you can state that to the jury?

A. I never paid no attention to it; what I know about it, I had to fulfill my duties under the instruction which I have got from

Mr. Loeb.

115 Q. Did you ever figure out the number of barrels of water the tank would hold?

A. I helped Mr. Loeb to take the measure of it, but he figured it out himself.

Q. How many times did you help to do that?

A. I do not remember.

Q. You never figured it out yourself?

A. No, sir, I did not.

Q. And you do not know how many barrels of water that tank would hold?

A. It is none of my business.

Q. Do you know or not?

A. I know how much it holds, yes.

Q. Well, how much.

A. He told me it holds 60 barrels—he brought the paper in the brew house.

Q. Then it—18 or 19 barrels of water, 500 pounds of malt and 1400 pounds of grits didn't fill the cooker, did it?

A. No, sir; not quite half.

Q. Mr. Schmitt, could you recognize a rough drawing locating the different valves connected with that cooker, if it was shown to you?

A. I guess I can subscribe it without any, or any showing of it, if you ask me the right question, so I can understand it.

Q. It might take a good many questions, though—the steam gauge is on top of the cooker, is it not?

A. Yes, sir; it connected right to the safety valve.

The COURT: Mr. Childers, there is no harm showing that to him and letting him see whether he recognizes it.

A. I can see it if he has it right there.

Mr. FIELD: I would like to see it first, myself. I think a good sketch of the place and the machinery would greatly facilitate this hearing, myself.

116 Mr. CHILDERS: This is made by Mr. La Driere, but he has not got the safety valves on it.

The COURT: Perhaps the witness can put the safety valves on it.

Mr. FIELD: I have no objections to this, if the witness says it is all right.

Mr. CHILDERS: This shows the measurements. I think if I would be permitted to go up here and point out to the witness, he would recognize what it is possibly, without any trouble.

Q. Now that represents the cooker (exhibiting drawing to witness).

A. Yes, sir; that is the shell of it.

Mr. FIELD: What is that, Mr. Childers.

Mr. CHILDERS: The outlines here.

Mr. FIELD: The outline of the figure on the paper represents the cooker.

Q. Now A will be the steam gauge on top?

A. No, sir; that is all wrong, the steam gauge is on the other side over here.

Q. On that side?

A. Yes, sir.

Q. Well, there is a pipe that runs up to this T, marked on one side A and on the other B?

117 Mr. FIELD: That is a cross pipe?

A. The steam gauge is on here and on the other side here is blow-off of the safety valve connected with an inch and a half pipe—runs through three or four different elbows to the roof.

Q. Then the steam gauge would be B on that side?

A. Yes, sir.

Q. And A would be?

A. The inside pipe—the safety blow-off—that is——

Q. That elbow should come down here?

A. That is up here underneath the joice—nothing underneath the joice here and then another elbow goes up through the roof.

Q. It starts from the safety right here and goes on right up there and on out, the way you describe?

A. Yes, sir.

The COURT: Is the jury getting any benefit from this?

Mr. FIELD: I suppose the jury would understand it when they see the paper.

Mr. CHILDERS: I think the jury will understand this.

The COURT: I think the witness might step down and show the jury what he is testifying to.

Q. This pipe here—that running up to this T that I called your attention is the steam pipe coming through the cooker?

A. Well, it is connected on top.



Q. On top with the safety?

A. Yes.

118 Q. And this T is about 9, 10 or 12 inches across there?

A. I never measured it.

Q. More or less, about the length of that pencil?

A. It is a short nipple on there where the pipe is connected.

Q. On one branch of the T is the safety and on the other is the steam gauge on top of the tank?

A. Yes, sir.

Q. Now, here is a pipe that comes in here, marked Water Pipe—comes in there with a valve—marked Valve—that is to let in the water is it not?

A. This ain't made on there right.

Q. This is only approximate?

A. This is supposed to be the water pipe that carried the steam away from the pressure—from the cooker—that is not on there.

Q. There is the exhaust pipe?

A. Yes—there is so many pressure on there so the safety blows off itself.

The COURT: I do not see how you are getting that to the jury in any proper way, and if the sketch is to be used, it should be large enough so he could step before the jury and explain it. It does no good to tell about it up here.

Mr. FIELD: Maybe the witness could make a sketch himself.

The COURT: The jury cannot be getting any understanding of this in that way. If he can take the large one and himself mark on it where these things are before the jury, so that they will understand what he is driving at, it may do.

Mr. FIELD: He has volunteered a statement that he has seen the large sketch and that it is not right.

119 A. It ain't made right.

The COURT: Perhaps he could draw one.

A. I seen it when he opened it that it was not right—I have my eyes on these things myself.

The COURT: If he will step down before the jury so they will understand it.

Mr. Childers and the witness thereupon stand down before the jury.

A. I will show you what is not right on that.

Mr. CHILDERS: Show it there to the jury.

A. This tank is different entirely—what this shows right on here (referring to La Driere plat).

Mr. CHILDERS: The bottom is as indicated with two pencil marks which the witness has made.

A. Well, this ran just like the tank—the bottom is dished and the stuff runs out altogether, so no trouble to get at it—now the top is dished the same way. Now here on the other side of this, there is beltings on there, where the gear runs in—the upper shaft to start

the steering gear inside. Now here there is a connection on that—a connection to screw the pipe into it with a thread—it is riveted on—right on top of it is a short nipple with T in—now excuse me it is not a T—it is the safety valve is screwed in there, and the discharge of the safety valve pipe runs outside through the brew house so it discharges out in the open air and on the other side is the pressure gauge—the gauge is connected and showed me the amount of pressure I have on there.

120 Q. How far apart are they?

A. Just enough room so the safety works free—just so the safety can work itself—it is supposed to work itself.

Q. If you get too much steam there, the pressure on those valves is overcome?

A. No, it cannot because it cannot come off.

Q. It blows it off?—a hook in there—it is supposed to blow off itself; I am not supposed to raise it either—there is a connection on there about six and eight inches in diameter for the purpose for to put a wind pipe on there in case you want to use that without using it—without pressure, so you can put a wind pipe on so as to let the steam, when the mash cooks, to go up outside, so it cannot raise any pressure. This pipe is blocked up entirely. The water connection is connected on to this pipe here. Above is a valve where you stop the water—and pump it in whenever you need it.

Q. Is the water not pumped in on the other side?

A. No, sir; on top right here—now in front of it, right on the top, on the bottom of the top here, there is a man hole.

Q. Where is that man hole?

A. It is right, it is supposed to be, right here.

Q. About here?

A. Yes, sir; it is big enough for a man to go in there and clean that tank out, and when all material is in there during the process I have orders to close this man hole tight, so the steam or the pressure cannot escape except it has to go through the safety.

JUROR: Is not the object of a safety valve when you get too much steam in the cooker to blow off?

A. It is supposed to blow off. I suppose the jury knows that much.

121 Q. Now you state that you were instructed and that you did go up and set the safety valve; what did you mean by that?

A. Mr. Henry Loeb told me I should raise the safety valve before I start the steam down, so in case it will be stuffed up with something, it will blow off.

Q. You mean by that that the glucose, sticky material, might make it stick and it would not blow off properly?

A. It is one sure thing.

Q. That is the reason?

A. I will explain it a little more closely. Now, when I get this mash into boiling, because that does that—that makes sugar now—it is melted and anybody knows it that when sugar—when it commences to boil, it will run through here—that is one sure thing

when it commences to boil—then you must have pressure on that to keep that down from foaming so it won't boil into the safety and stop up this thing and maybe explode: that is the reason, that is, that no mash can be raised in closed kettle without any pressure on it, and I never had instructions of Mr. Loebs, Henry or Jake that I should cook any mash without any pressure on it.

Q. I am not asking you about that now; I will take those things up when the jury is sitting down—now where is the steam valve?

A. It is about a foot above the bottom.

Q. Above the bottom—about a foot above the bottom of the tank?

A. Not the shell—I mean the bottom.

Q. What was the diameter of that pipe?

A. Inch and a quarter.

Q. Isn't it an inch and a half?

A. Inch and a quarter pipe—to the valve that goes into the tank here—that is an inch and a half.

Q. The pipe itself is an inch and a quarter?

A. Inch and a quarter from the steam line that supplies the steam—to feed me the steam — the sufficient amount of steam I need to make this mash with.

122 Q. Then, the thermometer that you have been speaking of?

A. It is on the side, more in front, about two feet away; it is right on the other side—it is wrong on here. It is right on the other side about a foot away from it, you might say, and a little further up, too. Of course, if the thermometer is too close to the steam gauge, it won't show the certain degree. It shows then more heat on the thermometer than it does on the mash.

Q. Now, this pipe that goes through the bottom down to connect with this pipe indicated here, at this tank below; what is the size of that pipe, the main pipe?

A. Now first, I am coming to that—first, the bottom is connected on to a kind of a connection where it is riveted on, where the steering gear sets in a place where the shaft runs around.

Q. Socket?

A. Yes, sir; socket, then the pipe is screwed into that socket there, four-inch pipe.

Q. It is through that that the mash goes?

A. Not through that—way down below there is no pipe whatever inside of it.

Q. Through this here—through that four-inch pipe that the mash passes from the cooker down to the mash tub?

A. Yes, sir; now right here on this connection here is a four-inch nipple and the steam—

Q. Now here—where—

A. No, sir.

Q. Where—

A. Right here—here is the cross where it goes to wash out—and here is where it runs into the mash tub—the other sparkler, one going on one side and one on the other side—that is that connec-

tion that I explained to you—that I showed you—here in the four-inch valve and here is the main stop.

123 The COURT: I wish that could be put on the large plan.  
Mr. CHILDERS: We will have it, I think.

A. That is supposed to be a space between here—when I mash my grits, because that stuff gets on the bottom right away if you have not got the stirring gear running fast enough to keep it a-flowing—you see that the grits would stay down here and block off that space—get as hard as a rock, and I could not let the stuff run into the mash tub after it is ready to mash—into the lower tank.

Q. Is not that small steam pipe you have put below this I?

A. No, sir; on this four-inch nipple, right about that cross—

— That cross being what you call the starching business—

A. Here is a valve connected—

Q. No steam through that?

A. No, sir; not whatever—it never been used for any mash there.

Q. What did you say the use of it is?

A. For the purpose of cleaning the tank, after the mash is out of it.

Q. And this one.

A. After when the mash is out—

Q. One is used for cleaning purposes?

A. Yes, sir.

Q. And this other one marked "J." where did that run?

A. That runs into the mash tub; it is connected with the sparkler (sprinkler) inside.

Q. Is there anything that runs along the false bottom here, on this mash tank?

A. Now here there is another "T" in there—that is below this main valve—pipe—runs over and runs down into the tank, and after you are ready underneath—ready for the mash in the

124 mash tub, you turn this valve on.

Q. I do not understand that.

A. And wash the malt under this false bottom.

Q. False bottom of the mash tub down below—I do not understand you.

A. Of course, I explain it a little more so you can understand it. Now see, the malt is ground—run over two rolls before you can use it, then while you mash that—soak it for a while—all the malt—the fine stuff goes through the false bottom with holes in it, you know.

Q. Well, let me ask you, when this little steam pipe here, which you say carries how much steam—what is the diameter of the pipe?

A. Half an inch.

Q. When that is open that puts steam in the cooker above, too?

A. Sure thing; it has to, because it is above the valve. It has to go in the tank.

Q. When both these—the one on the side and the one in the bottom was open, both were putting steam into the cooker above; when both opened, steam goes through both, the one on the side and the one underneath?

A. Yes, sir.

Q. The two pipes?

A. I have instruction when I should raise it to the boiling point—I should open the lower valve first to keep the pipe clean, then the one on the side, that is for the purpose to raise—to furnish me the amount of steam—that is the main valve that I use during the process. There is not only the valve alone—there is a steam coil on the inside with holes in it.

Q. A steam coil on the inside with holes?

A. Inside the tank, yes, sir.

Q. This steam all gets into the mash through the coil?

A. Through the coil before it goes into this.

125 Q. This direct connection?

A. Before it goes in, so as to keep this clean.

Mr. CHILDERS: I think that is all I want to ask about it.

At this point counsel and the witness returned to their respective seats.

Q. Now, Mr. Schmitt, at the time that this accident happened—first look at this plat here, the one marked La Driere plat—where were you—that shows—

The COURT: Let him step down before the jury.

Counsel and witness again step down to the jury box.

The COURT: Hold it up before the jury.

A. That is supposed to be the mash tank; there is supposed to be the cooker, on top; there is the iron step, and there is the board where I went across—plank—marked on the plat—the measure of it was eleven and a half inches. While I was on my duty, I walked across and intended to shut this valve off—I had instructions to shut this valve off when it just about commenced—the mash commenced to boil and I had to bend under it to get a hold of it.

Mr. FIELD: Under the tank?

A. Yes, sir; because the ceiling ain't high enough and when I reached and was ready to turn away—to open the lower valve for to get ready to mash down my stuff, you know—to open the lower valve—there are two connections on there to let the stuff down in the tank—there is another one below—I try to open that  
126 and when I just about to get my hands onto it, the stuff came down.

Q. You were standing on this board?

A. Right here.

Q. And leaning over?

A. Yes, sir.

Q. For the purpose of closing that valve?

A. Yes, sir.

Q. And the other valve, the big steam valve on the side was not open?

A. No, sir—yes, sir.

Q. Was open?

A. Not quite open, just the amount of steam that Mr. Loeb told

me to open that, so as to get the same amount of degrees in the same minutes.

Q. How many revolutions?

A. Two revolutions of the wheel that controls the valve—it takes that much time to work it up to certain degree—now this tank doesn't stand the way it stands before that thing.

Q. This—these two circles are supposed to indicate that?

A. This tank comes pretty near a foot away from this. It shows more this way.

Mr. CHILDERS: I will say for the information of the jury that this is not supposed to show that—this is a section. This shows it here.

A. That shows that it is further out—you see that this valve here I cannot reach it with my hand; I had to bend under it.

Q. We understand that—the other valve—two revolutions on the wheel would control the other valve?

A. Yes, sir; as much as I can remember.

Q. And the small steam valve, how did you have that, was that open entirely?

A. That was shut. I do not remember whether I did  
127 shut it tight or not, because the stuff came over me while I was working on it.

Q. You mean you had just gone there to close it immediately before the accident?

A. I cannot say if I closed it entirely. It was the intention to shut it off.

Q. That is what you went there for; to shut it off?

A. Yes, sir.

Q. Before you went there it was open?

A. Yes, sir.

Q. Was it open to full capacity?

A. Sure thing—I had to—he told me to do it.

Q. What degree had the material in the cooker reached at the time that you went down there to close the lower valve?

A. It had about between eighty-two and eighty-four degrees—I cannot say by the exact pressure, but it generally had that much when I went down all the time.

Q. Between eighty-two and eighty-four?

A. Yes, sir; that is Reamur.

Q. That is about 216 or 218 Fahrenheit; is it not a fact that it boils at 78 Reamur?

A. Not on mash; maybe on water, but not on mash.

Q. (Exhibiting diagram to witness). Now you say that this which you describe on top of the tank or the cooker, which was intended to be open and through which the water pipe runs now, was closed up—that is the fact, is it—the thing you point out on the maps—this thing through which the water pipe runs—here—the pipe that supplies the water, that lets it into the tank, you say that is closed up?

A. That is closed up entirely.

Q. And that was intended to be open, provided you were to cook without pressure?

A. Yes, sir.

Q. And then, of course, the steam would not be confined in the cooker?

128 A. In the whole brewhouse—it is one sure thing—it cannot escape anyway.

Q. Then you can cook without pressure and use steam?

A. Not in this kind of cooker.

Q. If that had been open you could; all that would be necessary to cook without pressure would be to take off the top of that thing?

A. That is not in my business; that is the brewmaster's business.

Q. That is the fact, is it not?

A. No, sir.

Q. It is not a fact that if that top had been off you could cook without pressure?

A. What is that?

Q. It is not a fact, then, that if the top, the thing on top, had been removed that you could not cook without pressure?

A. Yes, sir.

Q. You could or could not?

A. I could cook it without pressure, yes, sir.

Q. You say there was another opening on the top of this cooker a man hole, through which you could go into it—a man could get into the cooker to clean it?

A. Yes, sir; there is a hole on it; yes, sir.

Q. That is the hole you went through when you went into the tank to put that patch on there, is it not?

A. Yes.

Q. Well, if that was open, would the steam be all confined in the tank, in the cooker?

A. No, sir; there is no way to do it, because no windpipe on to escape—the steam when it is boiling—it forms steam, does it not? That would have filled the whole brew house in a few minutes—that would fill a house in a few minutes so that nobody could get in there for heat.

Q. When you were boiling without pressure, you turned on a smaller amount of steam, didn't you, and regulated it accordingly?

129 A. No, sir; I cannot boil any mash without steam except there is a pipe on there that takes away my steam and the heat away from it entirely, from the tank.

Q. I understood you to say you did not know how much pressure would be made by two revolutions—two turns of that valve.

MR. FIELD: I object to that question, because in the first place the witness didn't say so, and in the next place it is a matter of common knowledge of physics that the pressure depends upon the safety valve.

THE COURT: Objection overruled.

A. I do not know.

Q. When that was open and furnishing steam for use in the cooker, how much pressure would the steam passing through that

pipe into the cooker let in by two turns of the wheel; how much pressure would that make?

A. How long—how you mean—I cannot understand what you mean.

Q. Well, say at the time that this accident happened?

A. It takes about fifteen minutes to raise it to the pressure so the safety runs off according to the weight that was on there—that was the instructions.

Q. It would take about fifteen minutes for the steam coming in through that pipe after making two revolutions, to raise the point where the safety would open?

A. Well, didn't it depend upon what pressure the fireman had on his boiler—I was not there—I do not know how much—it took that much to raise it up that time.

130 Q. It doesn't make any difference what amount of pressure or what amount of anything else the boiler has in the boiler room, does it, if the steam pipe merely lets in a certain amount of steam?

A. Well, that depends on how hot the steam is. If she is watery—if lots of water, it is not hot and the steam has eighty pounds or ninety pounds, it has more heat in it than it has in sixty pounds—that is one sure thing.

Q. What is the pressure of steam to the square inch?

A. I am not an engineer and I do not know anything about it, Mr. Childers.

Q. Then you say you do not know as a matter of fact how much pressure two turns of that wheel would exert after steam going through it fifteen minutes; how much pressure it would make?

A. It took that much that morning.

Q. How much?

A. Two times to raise my mash in fifteen minutes, according to Mr. Loeb's instructions.

Q. Had the mash been raised to the boiling point at the time?

A. What is that?

Q. Had it been raised to the boiling point at the time before the accident?

A. Yes, sir.

Q. And steam had been passing through the big valve how long?

A. About twelve or fifteen minutes, it takes about fifteen minutes to raise it up till the exhaust discharges on the safety.

Q. Did you take the precaution to raise the safety that morning?

A. Yes, sir; I did.

Q. You had already raised it, had you?

A. Yes, sir.

Q. And you know it was all right when you examined it?

131 A. Yes, sir.

Q. You are positive of that, are you?

A. Yes, sir.

Q. You never failed to do that?

A. I never failed. I can swear to it, and I can prove it.

Q. I will ask you about these two weights; that weight you say requires twenty pounds pressure (referring to exhibit 1.)



A. Yes, sir.

Q. In order to open the safety valve?

A. Yes, sir.

Q. The safety valve would not be open with that weight on the lever—it is a kind of a lever, is it not?

A. Yes.

Q. Until the pressure was up to twenty pounds?

A. Yes, sir; it is shoved away back, as far as you could reduce it—that is the way he showed me.

Q. Shoved away back up and down the lever?

A. No, just set it away back and leave it set there so she blows off.

Q. It works up and down the lever—this way (indicating).

A. No—it never moves except the pressure on the tank raises it so it can discharge.

Q. How can you regulate the pressure you want with the same weight unless you change its position on that lever, or change the lever?

A. The lever is about that long (indicating). If it is away back, it blows off before you hang it back on the end. (Indicating with hand manner of operation).

Q. If I had a stick running out here and this weight was on the end of the stick, it would exert more weight—hold down harder than if I pushed it along here against the table (indicating).

A. Yes, sir, certainly.

Q. And that is the arrangement of that safety valve?

132 A. It used to be the way when Mr. Loeb's turned it over to me.

Q. And you then next commenced to use a small weight (referring to plaintiff's exhibit 2).

A. Yes, sir.

Q. How much pressure did it take to blow that off?

A. Twelve pounds.

Q. You were not using that that day?

A. Of the accident?

Q. Yes.

A. No.

Q. When did you use that second one?

A. That was on after I put that patch on—the first patch.

Q. When was that?

A. That was in June, or July, or August; I cannot remember.

Q. You put the first patch on in June or August?

A. I think it was in August.

Q. 1905?

A. 1905.

Q. You commenced to work there in the middle of April, 1905?

A. Yes, sir.

Q. You put on the first patch then?

A. Yes, sir.

Q. Now what made you change the weight?

A. Because I told Mr. Loeb's I'm afraid this blow out on me—it

looks kind of bad and I have to reduce the weight for safety, so as not to get hurt—that is the idea of it.

Q. Was that the first conversation you ever had with Mr. Loeb about the condition of that cooker, after he put you there to work in April?

A. I do not understand this.

Q. Was that the first talk—you know what the word conversation means?

A. When I put the patch on that day?

Q. You say you put the patch on there in June or August, 1905; was that the first talk you ever had with Mr. Henry Loeb about that cooker, as to whether it was safe or not?

A. No, sir.

Q. That was not the first talk?

A. No, sir.

Q. Well, when was the first talk after he placed you there to do the brewing in April, that you had with Henry Loeb—he put you to work in April?

A. Yes, sir.

Q. Now when was the first talk you had?

A. Couple of months after.

The Court: About the safety of it?

A. Yes, sir.

Q. Was that not about the time you put the patch on?

A. It was not my business.

Q. I am fixing the time of the talk; was the talk to which you referred, the first talk, about the time you put the patch on?

The Court: That is, about the safety of it?

Q. Is not that the fact?

A. I do not understand what you mean by that.

Q. You have said it was about two months after April—after he took you there and told you to do the brewing, before you had the first talk with him, Henry Loeb, about the condition of that cooker?

A. I asked him—I told him that the cooker is leaking and I showed him, and he answered me that has been leaking before—that ain't so bad.

Q. How much of a leak was that?

A. I cannot remember—it was the water leaking out—dropping.

Q. Just a drop or two?

A. Not a drop or two, just commenced to drop.

134 Q. And you went to work and put that patch on there?

A. I would not have put it on. He told me to put it on and I followed his instructions.

Q. You had been there at the brewery before, worked for the brewery for ten years?

A. What is that?

Q. You went to work for the brewery, in what year did you say yesterday, the first work you did?

A. The first work was general work in the brewery, not the brew-house.

Q. When?

A. The first Monday in June, 1897.

Q. And from that time on, although you were not engaged in brewing, you were around that brewhouse?

A. I was around the brewhouse but I had no principal job in there whatever.

Q. Did you ever notice this tank leaking?

A. It was not my business, and I never cared for it either.

Q. Does it always have to be your business in order so that you can see something, and if is not your business you do not see anything, is that it?

A. No, sir; it was not my business; it was the man that was brewing the beer at that time, and not mine.

Q. And you didn't observe it?

A. No, sir.

Q. You don't know whether it leaked then or not?

A. No, sir; I did not care for it.

Q. As a matter of fact, you do not know whether you cared for it or not; that is what you say?

A. A business that is not belonging to me; I am not interfering with anybody.

Q. You didn't know and don't know now whether it ever leaked before or not?

A. He told me that it was leaking before.

Q. I mean from seeing it?

A. That I cannot remember anything about it. I never cared for it.

Q. Did you do anything with reference to that leak in  
135 June—this leak we have been talking about, the first time, when the question of its leaking came up?

A. No, sir; I did nothing; I just called his attention to it in time to get it fixed so I won't get hurt, to have it examined what is the matter with it.

Q. Where was that leak, what part of the cooker?

A. I did not know at that time because the kettle nobody could look at it because it was setting on a wooden floor.

Q. Just some drops of water coming through?

A. Yes.

Q. Did they come through the floor?

A recess of five minutes was here taken.

Q. As I understand you, you did nothing with reference to that leak?

The COURT: That is the first time?

A. No, sir.

Q. And nobody else did anything with it?

A. I do not know.

Q. Did it continue to leak?

A. I do not know; I was not working there.

Q. I am talking about the first leak that you discovered; I am

Q. What kind of a patch did you put on, and how did you put it on?

A. The brewery has it laying around there yet; they hide it somewhere.

Q. You know what you put on, don't you?

A. (Not answered.)

Q. Is it not a fact that you put on a little small piece of iron?

A. No, sir; it is not.

Q. How big was it?

A. I do not know exactly.

Q. You put it on there and you cannot give any idea of the size of it. Was it four feet square?

139 A. If it would be four feet square it would cover the whole bottom of the tank; that is one sure thing.

Q. Was it two feet square? Was it two inches square—the iron?

A. I do not know exactly which size. I do not remember it sure.

Q. How did you fasten it in there—you put one piece on the bottom and the other piece on top and fastened it together, didn't you?

A. No, sir.

Q. How did you fix it?

A. According to Mr. Loeb; he told me to fix it.

Q. What was his instruction?

A. I guess he will explain it.

Q. I am asking you?

A. I do not remember no more.

Q. You don't remember his instructions or what you did?

A. No, sir.

Q. You don't remember what you did?

A. No, I do not remember no more—quite.

Q. Now, after that, when was the next time you had any talk with Mr. Loeb about the condition of the cooker?

A. Well, about this question before—I want to answer you more. What do you mean about the size of it?

Q. The condition as to whether it was safe or not?

A. Well, I put it on.

Q. When was the next time you said anything to him about the cooker?

Mr. FIELD: I understand he wants to go back to the other question, Mr. Childers.

Q. The next occasion and the next time, after this one, when you put that patch on there—the first patch?

A. (Not answered.)

Q. Can you answer that question?

140 The COURT: That is the next talk?

Mr. CHILDERS: Yes, sir.

Q. Do you understand that question?

A. The next talk is I remembered him—pretty near every week and told me—told the man to get it fixed.

Q. Told the man to get it fixed?

A. He went in the office—I do not know if he telephoned—or the bookkeeper—to the foundry, and the boiler-maker come.

Q. Now, before that, you say you went to him nearly every week before the boiler-maker came?

A. I guess he will deny it when he comes on this place.

Mr. CHILDERS: I ask the court to instruct the witness that he has nothing to do about what Mr. Loeb's will testify to.

The COURT: (to witness): The smoothest way to get along is to answer the questions.

JUROR: I do not think the Spanish on the jury are getting it at all.

The COURT: Ask the Spanish members of the jury if we go too fast for them to say so; I want them to hear the testimony.

Interpreter speaks in Spanish to the jury.

141 INTERPRETER: They say to talk a little slower because it gets mixed up—three talking at the same time.

Q. I asked you if you say that you went to Mr. Loeb's almost every week until he sent for this boiler-maker, telling him that the cooker was not safe, and asking him to have it repaired?

A. Yes, sir.

Q. Is that a fact?

A. Yes, sir.

Q. Well, what did Mr. Loeb's say to you at these different times—nearly every week?

A. He told me that we cannot repair it right now—in the middle of the summer—the business is rushing and we have to wait until in the winter time; we got time.

Q. That was in the summer of 1905?

A. Yes, sir; in the middle of the summer.

Q. And you put the patch on in August?

A. Yes, sir.

Q. Now, I have been asking you about conversations with Mr. Henry Loeb's after August—when you put the patch on; between that time now and the time that you sent for the boiler-maker—

The COURT: Have you fixed the time when he did send for the boiler-maker?

Q. When did you send for the boiler-maker; about what month?

A. I think it was about four or five weeks—before the accident happened.

Q. That was then sometime about the middle of November?

A. I do not remember when it was.

Q. Between August and November; then tell any conversation that you recollect—between August and the time that he sent for the boiler-maker; tell any conversations that you had with Mr. Loeb's with reference to this cooker?

142 A. I do not remember.

Q. You do not remember any?

A. No, sir.

Q. But you do remember one at the time that he sent for the boiler-maker?

A. I do when he sent for it, yes, sir; but not the date.

Q. I have not asked you for the date by this question. You said you could not fix it except four or five weeks before the accident happened; but at the time that he sent for the boiler-maker did you have any conversation with Loeb's about the cooker?

A. I do not remember.

Q. Then after the boiler-maker was sent for—in the first place; where did the boiler-maker come from?

A. No other place than the foundry.

Q. He came and took the measurements of the bottom of the cooker. I believe you said yesterday?

A. Yes, sir.

Q. Now did you, at that time, make any repairs or do anything about that cooker?

A. What is that?

Q. Did you do anything to the cooker at that time?

A. Between the time the measurement is taken?

Q. No, about four or five weeks or six weeks before the accident happened?

A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. Didn't you put another patch on the cooker about that time, about from four to five or six weeks before that accident happened?

A. I put that patch on three weeks before the accident happened, yes, sir.

Q. You can fix the date of that?

A. I can prove it with the man who helped to put it on. Mr. Loeb's gave me a helper for it.

Q. Is that the one that you used the white lead on, or was it the first one?

143 A. The first one and this one.

Q. Mr. Loeb's told you to use white lead on it, to fix it?

A. Yes.

Q. Now, talking about this one put on there about three or four weeks before the accident happened; what kind of a patch did you put on there then?

A. Put a patch on, the same as the other one, only two bolts in it.

Q. The other one only had one bolt in it?

A. Yes.

Q. How did you find where this patch was needed?

A. Because I got in and put it on.

Q. How did you find out, was the woodwork in the way?

A. No, sir.

Q. The woodwork had been removed, had it—the woodwork had?

A. Yes, sir; before, when I put the first patch on, I removed it.

Q. Was this last patch in the same place where the first one was?

A. No, sir.

Q. On the opposite side of the cooker?

A. Yes.

Q. Now, you put two bolts in that?

A. Yes.

Q. How large is the patch?

A. I do not know, I did not measure it.

Q. How did you fix that?

A. The same way as the other.

Q. Did you put a piece of iron used for a patch inside of the cooker or outside, below?

A. On the outside an iron plate—inside a couple of iron washers.

Q. And through the piece of iron on the outside and these washers on the inside you ran the bolt?

A. Yes.

Q. You drilled a hole through and run the bolt in?

144 A. Yes.

Q. And put on white lead to make that tight?

A. Yes.

Q. Is it not a fact then, after you put on that patch this last one—that you told Mr. Loeb's that the cooker is all right; that it is good for another year?

A. I never did such a thing.

Q. You never said anything of that kind?

A. No, sir.

Q. Now when did you commence to use that wheel for a weight, on the safety valve?

A. I commenced to use it when I put this last patch on it.

Q. Did you say anything to Mr. Loeb's about that?

A. Yes, sir; I did.

Q. What did you say to him?

A. I told him I have to reduce that pressure, because he told me once before that we have to brew till then, then this is going to be fixed.

Q. Brew till when?

A. That was about a couple of weeks before the accident happened the same time when I took that other heavy weight off and put that wheel on.

Q. Took the second weight off?

A. Yes, sir.

Q. And he told you that you had to brew until he got it fixed?

A. Get it fixed.

Q. That was about how long before the accident?

A. It was about three weeks, I think it was.

Q. Did you understand that the new bottom had been already ordered for it?

A. Yes, sir; I was——

Q. You understood that at that time?

A. Mr. Henry Loeb's helped us to take the measure of it.

Q. And this was when you spoke to them about that. Was  
145 that the time he told you to take—it take three or four months to get anything down at the foundry?

A. It was on the day when he promised me it was going to be fixed and the day before the accident happened.

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not talking about the one when the accident happened, but I am talking about the first leak which you mentioned to Henry Loeb.

A. Well, I cannot remember any more.

Q. You do not remember—you know you didn't do anything with it; you know that?

A. Yes, sir.

Q. And you say you could not locate it because the cooker was setting on a board platform?

A. Yes.

Q. And did you say you changed the weights that time. These weights?

136 A. No, sir.

Q. Now, you stated all that Henry Loeb said to you at this time when you first called his attention to the first leak.

A. There was no such a thing talked in this court room as about this weight—that I removed this weight when this first leak—I removed it after I had the first patch on, that I told you about yesterday.

Q. I want all the conversation you had with Henry Loeb when he spoke to you about this first leak in June, 1905; if you have given it all, say so?

A. I cannot remember any more; I told you that before.

Q. You have given all you can remember?

A. Yes, sir.

Q. And that is that he told you that it had leaked before?

A. That is what he did.

Q. And didn't amount to anything?

A. And I didn't give much attention anyhow because it is the boss's duty to furnish me a safe kettle.

Q. The court will probably tell the jury what the boss's duty is when he comes to it. Didn't you say something yesterday about asking Loeb if you could not bore a hole under the wooden floor and find out what the matter was?

A. I asked Mr. Loeb if I should do it, and he says yes.

Q. Did you do it?

A. I did do it.

Q. At that time—the first time—this is the first leak I am talking about?

A. No, sir.

Q. That is a different occasion?

A. It was the same day when I put that patch on, not before.

Q. Now I started out by asking you when you changed the weights and commenced to use the weight number two, the round ball, smaller than this?

137 A. I do not remember the date, but I changed it; I notified Mr. Loeb first that that weight is too much on that kettle.

The Court: I think he said that was when he put the patch on.

Q. Was that when you put the patch on?

A. Yes, sir.

Q. At the same time—what did Loeb say about the weight?



A. He didn't say nothing—he thinks I do the proper way—that is one sure thing—everybody looks for his safety.

Q. He didn't say anything at all, but let you go ahead, and you went ahead and did it—with reference to the weight, you went ahead and changed it?

A. No, sir.

Q. That is, he didn't say anything to you at all; did he say anything to you at all about the weight?

A. No, sir.

Q. Where did you get the smaller weight?

A. I do not know; I found it somewhere over at the brewery and I put it on.

Q. Now, about when was it that this patch was put on there by you?

A. I told you in August.

Q. August, 1905?

A. The first patch; yes, sir.

Q. Where was the patch, on the bottom of the cooker?

A. Sure thing, on the bottom, not on top.

Q. Might have been on the side, could be such a thing as a hole on the side of the cooker?

A. No, sir.

Q. Could not be?

A. No, sir.

Q. Anybody could make one there?

A. Make one?

Q. Yes.

138 A. I would like to know with what.

Q. With a drill—now, how much of a hole was that that you discovered?

A. I cannot remember. I seen the daylight come through and I called Mr. Loeb into the brewhouse and showed it to him.

Q. You went under the—you had to cut away the wood to get at it?

A. Why, certainly.

Q. I understand you to say that the malt and stuff ran through on you while you were doing that?

A. Yes, sir; and Mr. Loeb seen it.

Q. You cut away the woodwork underneath, and while you were doing that the malt was running through there—how much malt was there in the cooker at that time?

A. There was nothing in there; it was empty.

Q. But it was running through on you?

A. Yes, the stuff was laying under, between the cooker and the wooden floor—it was sour—stunk, you might say.

Q. You went down in the cooker and could see the daylight coming through the hole?

A. Yes, sir.

Q. And you put a patch on there?

A. Not before I had the privilege to do so.

Q. When you spoke to him about changing the weight and taking that wheel, what did he say about that?

A. I had no conversation with him, whatever then.

Q. You just told him you were going to make a change?

A. Yes.

Q. For the purpose of reducing the pressure?

A. About 5 or 6 pounds.

Q. You told him you were going to do that for the purpose of reducing it?

A. I done so every time I choose—I reduced the pressure—every time I reduced it—every time from that heavy weight down to the wheel.

Q. And you told him that—without asking him?

A. I did ask him.

Q. Is it a fact that you did it first and told him about it afterwards?

A. I would not do anything without having the permission to do so.

Q. Then he told you every time you made the change in these weights to do it—he gave his consent—gave his permission?

A. Yes, sir; he did.

Q. Before you did it?

A. Yes, sir.

Q. When you made all three changes?

A. Yes, sir.

Q. You are positive of that?

A. Yes, sir.

Q. Now, where did you get that wheel from?

A. From the tank.

Q. What tank?

A. On the cooker.

146 Q. On what pipe?

A. On the water inlet, where you pump the water in the boiler.

Q. You took it off of the valve through which the water passes into the cooker?

A. Yes.

Q. How did you get along without the wheel?

A. Because that wheel is loose on there and it won't stay on there. It is loose on there—it falls off every time.

Q. What did you do for a wheel on the water pipe—valve—for the water pipe?

A. You had to lay it on the side, and when you need the valve and open it, you stick that wheel in there and open it.

Q. You used it for both purposes?

A. Yes, sir.

Q. Now, did you have any conversation with Henry Loeb between the time that you told him about this wheel and the first day of January?

A. No, sir; I did not.

Q. None at all—you went along without any trouble up to the first day of January?

A. Yes.

Q. That day you say you worked half day—New Year's day?

A. Yes, sir.

Q. Did you work in the forenoon, or the afternoon?

A. In the forenoon.

Q. Were Henry and Jake Loeb both there that day?

A. I never take much attention to Mr. Jake Loeb, whatever; I do not know if he was there or not.

Q. Was anybody present with you at your conversation with Mr. Henry Loeb on the first day of January?

147 A. There was nobody else in there, except Mr. Loeb when he starts to take his shoes off—change his shoes—when he went up I was pumping the water for the next day.

Q. And nobody else there?

A. No, sir.

Q. Now, what did Mr. Loeb—what did you say to Mr. Loeb—did you begin the conversation, or did he begin it?

A. I showed him when the kettle was commenced to leaking a little bit on that patch and I ask him if that kettle ever get fixed, and he answered me, it ought to have been fixed already—it has been ordered long enough—and yes—we have to brew yet and then we will have it fixed.

Q. Have to what—have to brew yet?

A. Yes, sir.

Q. Didn't you say yesterday that you would have to brew two or three more times?

A. Well, we have to brew this time and then it is going to be fixed—he might have it done by this time—that was the conversation.

Q. I want you to tell exactly what he said about going on with the brewing?

A. I don't remember no more—I tend to my business.

Q. Well, repeat what you did say—repeat the conversation about going on with the brewing?

A. That is the repeat he give me—it hold for a time or two yet and then we will have it ready and then we will put it in.

Q. Did he say that—that it would hold for one or two times? Yet, and then we will have it ready—he said that, did he?

A. Yes, sir.

Q. Is it not a fact that the only thing that he said to you, was that the kettle had been ordered and it would be fixed and they are a long time doing things at the foundry?

A. I do not know.

Q. You do not know whether he said that or not?

148 A. I do not know—I had enough water in it—at the same time I went up and put the water off—meantime he went downstairs and I went down and he told me—it was about time to go home and he told me, you are going to be here on time—I said yes—that is the last conversation I had.

Q. He asked you if you were going to be on time tomorrow morning and you said yes?

A. Yes.

Q. He was in the habit of asking you that?

A. He generally ask me that every time I was brewing.

Q. Was he there on the morning of the 2nd before the accident happened?

A. No, sir.

Q. You never saw him?

A. No, sir.

The COURT: He has not told at all, I think, how often he went through the process. I do not know whether he did it daily, or twice a day, or once a month, or how.

Q. How many times a week did you brew?

A. It depends upon how the business was.

Q. In the summer time, how many times?

A. Generally three times a week.

Q. In the winter time?

A. Generally once or twice, it depends on how business was.

The COURT: And were there other cookers in the brewery or was this the only one?

A. The only pressure cooker, yes, sir.

Q. You say when the accident happened, you didn't know anything after that, until—at all?

A. No, sir.

Q. Until what time?

149 A. Till I realize something, it is about 2 weeks after I was taken away from the hospital.

Q. How much did you realize then—could you talk?

A. I could talk all right, yes.

Q. And carry on conversation—rational conversation, could you not?

A. I could not remember what I was talking. I do not think I was responsible for what I was talking at that time.

Q. When did you get so that you could understand what was said to you and what you said?

A. I do not know—it is about two months and a half after the accident happened I was about able to have a little conversation with somebody that I understand it really.

Q. Two months and a half?

A. Yes.

Q. Long after you left the hospital?

A. Yes, sir.

Q. Do you know how you happened to be discharged or removed from the hospital?

A. I do not know. I cannot remember.

Q. You were removed from the hospital to where?

A. To my sister's house.

Q. Did you have a nurse there?

A. Yes, I think so.

Q. Do you know who she was?

A. Well, I know it, that it was a young fellow from the hospital.

Q. What is his name?

A. Well, I know it now—I did not know it that time—Tom Milet.

Q. Do you know where he is?

A. I do not know.

Q. You had a physician all the time, didn't you?

A. I think so.

Q. What was his name?

A. Mr. Carns.

150 Q. During all this time, did you ever have any conversation with him?

A. I do not know—not according to whatever amount to much.

Q. When you talked to him, you didn't know what you were saying, if you did talk to him for two months and a half?

A. Yes, I do not, I do not remember what I was talking.

Q. Did you ever go up to his office after you left the hospital?

A. After discharging me, yes; they gave me the privilege to go home and see my wife and four children again—for three months pretty near.

Q. Did they ever tell you to come back to the hospital—to his office I mean?

A. Yes, sir.

Q. Did you go?

A. Yes, sir.

Q. Every time he asked you to come back?

A. Yes.

Q. Don't you know the last time he asked you to come back there, you failed to do so and have not been there since?

A. I was not able to go there.

Q. Did you let him know; did you tell him that you were not able to go there or send him word that you were not able?

A. I think Mr. Carns was not the gentleman that I should go after and look after—I didn't have to run after him.

Q. Didn't he tell you that he wanted to do something else to your hand?

Mr. FIELD: I object to this as not cross examination.

Mr. CHILDERS: It may be laying the foundation for contradiction.

151 The COURT: The objection is made that it is not cross-examination.

Mr. CHILDERS: It may be well taken. I will not insist on it.

Q. You say you got \$21 a week at the brewery as a brewer?

A. Yes, sir.

Q. For six days a week?

A. Yes, sir.

Q. You have been getting that since you went back to the brewery, have you not; since June, 1906?

A. Yes, sir.

Q. Up to what time have you been paid \$21 a week?

A. Till I quit, I suppose.

Q. When did you quit?

A. About two months ago.

Q. You quit voluntary, didn't you?

A. On my own account, yes, sir—I guess I don't have to ask anybody if I want to quit.

Q. Now, nobody has said that you did—you don't think that you could make \$21 a week now?

A. Not only \$21 a week.

Q. That was what you were getting before you was hurt, \$21 a week, was it not?

A. No, I have got only \$20 at that time.

Q. Before you were hurt, you only got \$20?

A. Up to the first of April with the agreement the Union had with the Southwestern Brewery & Ice Company.

Q. And from the first of April on, you got \$21 a week?

A. Yes, sir.

Q. You were doing the brewing up to the time you quit, were you not?

A. Yes, sir; with help, not alone.

152 Q. How long before you quit had you been doing the brewing?

A. From the first day on, I commenced again—it was in the middle of June, 1906.

Q. Now what did the helper amount to that you received, what did they do to help you; how much of it did you receive?

A. The heavy work—doing the cleaning, and so forth.

Q. Every time you brewed?

A. Between the brewings and after the brewings.

Q. What different help did you have from that, which you had before the accident. Did you have help before the accident happened?

A. Once in a while, yes, when we was rushing, that we had to go through—when we was in a hurry to go through with the work he gave me help.

Q. Did you have any different help since you commenced work in June, 1906, than that which you had before the 2nd day of January, 1906?

A. Yes, sir; different help, altogether.

Q. What was the difference in it?

A. No brewers—just helpers.

Q. What difference in amount—did you have any brewers before the accident happened to help you?

A. No, sir.

Q. Did you have any brewers after the accident happened to help you?

A. They would not hire no brewers because they was too poor. They cannot pay it.

Q. Well, you didn't have any, did you?

A. What?

Q. Any brewers after you went back to work in June, 1906?

A. I didn't have no brewers—no, sir—there is not man working there that knows anything about cooking beer.

Q. Had you had help just like you had before you were hurt?

153 A. Yes, sir; I had more help.

Q. You had more help?

A. I had help to open the sacks for me, because I could not handle no knife—I cannot handle it yet, either—they had no hopper yet.

Q. And helped cleaning out?

A. They cleaned everything, yes, sir; the first five or six months.

Q. Before the accident happened—you said something about one finger on the right hand, or the one next to it—were those fingers deformed?

A. It was not.

Q. There was no deformity in those two fingers?

A. I never noticed anything on it, except—I could use it as good as any one of them—it was as good as ever.

Q. Was it not stiff?

A. It was not stiff, no, sir.

Q. You had no stiff, rigid fingers on your hand?

A. I had all good fingers on my hands.

Q. You never said to Dr. Carns that two of the fingers could not be straightened out when he talked to you about straightening them?

Mr. FIELD: Objected to as not cross examination.

The COURT: I think if he said anything to the contrary to what he is testifying, that it is cross examination.

Mr. FIELD: I think he should fix the time, place and persons present.

Mr. CHILDERS: Well, I do not know whether I can fix it, except during the time he was treated.

154 Mr. FIELD: I submit that that is not sufficient.

Q. Well, on the occasion of the last time you saw Dr. Carns in his office?

A. I do not remember the time when it was. It was the last time I was there, we had that cold spell of weather in the spring—in March.

Q. Did you say anything of that kind to him?

A. Not in his office.

Q. Or anywhere else?

A. Not if I remember; I ever had with him.

Mr. CHILDERS: If it was necessary to lay a foundation, I will have to ask the question as to the time later on.

The COURT: You can recall him, if it is necessary.

Q. I want to ask you when you put on that second patch—did you do anything with it—the one that you put on in November or December—did you fix it about a week after?

A. No, sir; I would not touch it.

Q. You never did anything with it after you put it on there?

A. No, sir.

Mr. CHILDERS: I believe that is all.

Redirect examination by Mr. FIELD:

Q. You know the name of the boiler maker, who took the measure for the new bottom of the boiler?

A. Mr. Ridley.

Q. Matthew Ridley?

A. Yes, sir.

155 Q. How do you fix the date to your return to work?

A. I do not quite understand you.

Q. You have testified here that you returned to work after the accident in the month of June, 1905?

The COURT: Six.

Q. 1906—now, how did you fix that date, how do you know it was June?

A. Well, Mr. Loebs can say that more plain—it is in the Revenue book, I guess, when I commenced, he seen it right on the record of the brew.

Q. Now, if that book should show that you returned to work on the 14th day of May, 1906, you would not dispute that, would you?

Mr. CHILDERS: I object to that as leading.

Mr. FIELD: I do not see much materiality here. I am seeking to show that the witness does not know absolutely when he went to work.

Mr. CHILDERS: I will withdraw the objection.

Q. Now, if the Revenue book showed you went to work on the 14th of May, you would say that is right, would you?

A. No, sir.

Q. You would not?

A. No, sir.

Q. Now, how do you fix the date when you went back to work?

A. I do not remember the date when it was, but it was in June?

156 The COURT:

Q. He asks you how you know it was in June?

A. Because I had to report myself to the Insurance Company as to the work and I guess the Insurance Company will show it to you.

Q. Now, you were asked about raising the safety valve at some period in this process of brewing, for what purpose did you raise that safety valve?

A. I had to raise it through the instruction of Mr. Loebs, so it won't stick—so it discharges.

Q. Well, then for the purpose of seeing that it was in working order?

A. Yes, sir.

Q. Now, with reference to the opening and closing of the valve, the one on the bottom and the one on the side; with both those



valves open the pressure in the cooker could not exceed the amount that the safety valve would hold down, could it?

A. Well, I cannot quite understand that question, Mr. Field.

Q. Well, I want you to explain to the jury, if you can—if it be possible—if, say—that your safety valve is set to blow off at six pounds, would it be possible to get more than six pounds pressure in that cooker?

A. Well, yes, sir; you get a little more in.

Q. How?

A. If you keep the valve from blowing more steam—the mash gets hot and it makes more pressure—it raises the valve higher and it cannot discharge fast enough, and it raises a little more pressure—sure things.

Q. That is, if the capacity of the two valves to feed steam exceeds the capacity of the safety valve to let it escape?

A. Yes, sir.

Q. Can you state whether or not you were at the time of this accident—you had any greater amount of pressure than you had when you last brewed before?

A. It had not got that amount of pressure yet.

157 Q. I do not know whether you understand the question, or I do not understand your answer—but at what pressure did you safely brew the last time, as compared to the pressure on the day of the accident?

A. The same amount I had in carrying on before. I could not put any more on there, because my safety blows it off—discharges it.

Q. Now, you were asked in cross-examination, if, by leaving open the man hole, you could not brew without pressure—could not boil that mash without pressure in that cooker, and you said you could not because the steam would fill the brewing room, so that nobody could stay in there, on account of the heat, would or would not the same result be produced by any device for leaving an opening in the cooker, which did not contemplate carrying the escaping steam out in the open air?

A. No, sir; it cannot, except the pipe been taken down.

Q. Well, any effort to cook without pressure and to leave the steam come into the brew room would be impossible, would it not?

A. It is (not) impossible to stay in that room, because it would fill up the room entirely with steam and heat inside of five minutes.

Q. And you would broil the brewer while you were boiling the mash?

A. Yes, sir.

Q. Now, in the process of brewing, you use that water valve to let water into the tank generally the day before you brew?

A. Yes, sir.

Q. After you got the tank filled with water, or got the quantity of water you wanted in it, what occasion, if any, did you have to use that wheel which was on that water valve before there was another brew?

A. There was the same exactly—the same valves on another water valve and I used that.

Q. You had no occasion to use that water valve to let the water into the tank during the brew, had you?

158 A. No, sir; I never did.

Q. Or until after the brew was completed and you wanted to wash out?

A. That is all—and refill the tank with water, what we had to use for oversparkling the malt.

Q. You said in answer to a question by the Court that that was the only pressure cooker in the brewery. Was there any cooker in the brewery in which that mash might have been cooked without pressure?

A. No, sir.

Q. Then, there was no other apparatus in that brewery, which could take the place of this cooker in the process of brewing beer?

A. Not; not in this process, where they use raw grits.

Q. They don't use other processes, do they?

A. No, sir.

Q. Then, there was no other instrument in there that could take the place of this cooker in the process of brewing beer—in that brewery, I mean?

A. No, no other kettle, I do not think so.

Recross-examination by Mr. CHILDERS:

Q. Didn't Jake Loeb, who is now dead, tell you a few weeks before that, or soon before the accident, not to use the cooker under pressure; that you could get the same results if you boiled the mash for half an hour without pressure?

A. Never was such a talk about it.

Q. Did you ever have any talk with Jake Loeb on that subject?

A. No, sir.

Q. He never said anything of the kind to you?

A. No, sir; never had anything to do with Jake Loeb, whatever before.

Q. In any way, whatever, in connection with this business?

159 A. Only for Mr. Henry Loeb, that is all.

Q. Jake Loeb was president of the company was he not?

A. That is none of my business.

Q. I believe you said that—I believe you said it was your business when you answered your own counsel that he was, but when I ask you, it is not your business?

A. It is not my business. I was employed at the brewery and I got the money for it.

Q. Did you ever take any orders from Jake Loeb?

A. Not before I got hurt; no, sir.

Mr. CHILDERS: That is all.

A recess was here taken until 2 p. m.

H. B. RAY, a witness introduced on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. State your name?

A. H. B. Ray.

Q. What is your business, Mr. Ray?

A. I am bookkeeper for the Albuquerque Foundry and Machine works.

Q. For how long have you been so engaged?

A. Something over three years.

Q. State whether or not, as bookkeeper for the Albuerque Foundry and Machine Works, you have in your possession any records showing the tank repairs by that company for the Southwestern Brewery & Ice Co., in 1905 and 1906?

160 Mr. CHILDERS: We object to 1906. This accident happen on the 2nd day of January, 1906, unless it is on the 1st day of January, 1906.

Mr. FIELD: My purpose is to show that the repairs had not been made on the 2nd day of January, 1906; not to show that they were made.

The COURT: That obviates the objection, does it not?

Q. Have you such a record in your possession?

A. I have.

The COURT: Perhaps if you can limit your question, Mr. Childers' objection will disappear.

Mr. FIELD: I will limit it when I ask for the record—I will ask him what that record shows up to the 2nd day of January, 1906.

Mr. MARRON: I would like to see it.

Counsel inspect the record.

Mr. CHILDERS: There is no question, as I understand it at this time.

Counsel return the paper to the witness.

A. This is a memo taken from the books merely to refresh my memory, that is all.

Mr. CHILDERS: I would like to ask the witness one or two questions. I may not then object to it.

161 Mr. FIELD: Of course, the gentleman will have to bring the original record, if they demand it.

Preliminary examination by Mr. CHILDERS:

Q. Did you keep the books at that time?

A. I did.

Q. You made the entries in the books?

A. Yes, sir.

Q. Is that a copy of the entries?

A. That is a copy of the entries.

Q. Just as they were entered up on the book?

A. So far as the dates are concerned, yes, and so far as the order that we received is concerned, they are copies.

Q. Well, don't the books furnish any more information than that memorandum does?

A. We received, December 4th, 1905, an order from the brewery for tank repairs.

Q. Just for tank repairs?

A. Tank repairs.

Q. And that was all that was entered on the book, and that was all that was received.

A. Why, there is no specification about what should be done, except tank repairs—that is what was entered in the book when the order was received. We immediately figured the material requisite and ordered that material on the next day, December 5th.

Q. You do not know anything about what tank that was on the records of the book?

A. I do not.

Mr. FIELL: I propose to connect the entries in the book with this tank—and propose to bring here the man who took the order.

Q. That entry was made from a written order taken by some employé of the Foundry Company—and that entry in 162 the book was made from the written order?

A. The order was given by the brewery, whether verbal or written, I could not say now.

Mr. CHILDERS: I have no objection to using that memorandum to fixing the dates, but that if there is anything more on the books than shown on that memorandum, he had better produce the books.

Mr. FIELL: I will find out for you.

Direct examination resumed:

Q. Your books will show what material you ordered and from whom you ordered it, won't they?

A. Yes.

Q. Your books will also show what material was received?

A. Yes, sir.

Q. In detail?

A. Yes, sir.

Q. Now, will you bring those books here, or bring extracts from them, showing what material was ordered and from whom and showing what material was received and when?

The COURT: That is a complete copy of those entries.

Mr. CHILDERS: We do not care anything about Mr. Ray producing his books. We are perfectly satisfied to rely upon Mr. Ray's statements, but we prefer to see a copy of a complete entry in the books.

163 The COURT: Yes, that would be desirable, of course.

Q. You are able to state from your books, whether or not the repairs ordered and referred to had been made on the 2nd day of January, 1906?

A. The work was finished—

Q. I do not want you to tell when it was finished, but whether it had been finished on the 2nd day of January?

A. It was not.

Q. State, Mr. Ray, on what date the Foundry company received the order from the Brewery for the repairs on the tank?

A. On December——

Q. As shown by the books?

A. On December 4th, 1905.

Q. State whether or not it was necessary for the Foundry to order material in order to execute those repairs?

Mr. CHILDERS: The books would not show that, would they: I think that is a conclusion.

The COURT: I think you would have to put it, whether they did or not.

Q. State whether or not the Foundry Company ordered material to execute those repairs, and if so on what date?

A. We ordered the material for the job on December 5th, the next day after the order was received from the Brewery.

Q. If that material was afterwards received by the Foundry Company, tell the jury when it was so received, as shown by the books?

A. It was received on December 22nd, 1905.

164 Q. Now, state whether or not those repairs had been completed on the 2nd day of January, 1906?

A. They had not.

Cross-examined by Mr. CHILDERS:

Q. All your testimony is based upon the entries in the books?

A. Yes, sir.

Q. You had no personal knowledge of it, whatever, outside of the entries in the books?

A. Why, I have personal knowledge of ordering the material and of receiving the material.

Q. You did that yourself?

A. I did that myself.

Q. You attend to the correspondence on the part of the company?

A. Yes, sir.

The COURT: You still want copies of those entries, do you, Mr. Field——

Mr. CHILDERS: The part of the testimony as to the dates—put in by Mr. Field, I do not think we would want the books about that.

Mr. FIELD: The testimony did not go to such an extent that we would insist upon the production of the books.

The COURT: Do you want the copies of the items, Mr. Childers?

Mr. CHILDERS: We do not care for the copies of the items, either.

NICHOLAS TRUJILLO, introduced as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Nicholas Trujillo.

Q. Where do you live?

A. In the Highlands.

Q. What is your business, Mr. Trujillo?

A. I work on the Brewery.

Q. The Southwestern Brewery & Ice Company?

A. Yes.

Q. How long have you worked for the Southwestern Brewery & Ice Company?

A. About 14 or 15 years.

Q. In the course of your business in working for the Brewery, what did you do?

A. I used to work in the cellar, then they put me in the bottling works—It is a cold place where I used to work.

Q. You say your business was in connection with the bottling works?

A. Now, yes.

Q. How were you employed in the latter part of December, 1905? and first of January, 1906?

A. I was working in the cellar and I helped Joe at times.

Q. You mean Joseph Schmitt, the Plaintiff here?

A. Yes, sir.

Q. What did you help him to do?

A. Clean the kettle.

Q. How long have you known Joseph Schmitt?

A. About eight years, I guess; cannot tell you exactly.

Q. More, or less?

A. More or less.

Q. What was his business?

166 The COURT: You mean his work for the brewery?

A. A brewer.

Q. He was not always a brewer, was he?

A. Yes, he was all the time working as a brewer, making beer.

Q. Who made the beer in the brewery before he did?

A. Mr. Henry Loeb.

Q. When, if you know, did Henry Loeb cease to make beer in the brewery?

A. I can't remember when he quit.

Q. Well, were you at the brewery on the 2nd day of January, 1906?

A. Yes.

Q. I mean the day on which Joe Schmitt was hurt?

A. Yes, I was there, but he was burned when I came there to the brewery. I see the grits laying all round and a little steam coming out and I went in the bottling show and I see him all burned.

Q. Well, describe his condition to the jury?—in the first place what time was it when you got there?

A. It was about a quarter to seven.

Q. Now, describe his condition when you got there, where was he, and what was his condition?

A. He was in the bottling works—and then he—was burned—holding his hands that way (indicating), and that is all.

Q. How was he burned, much or little, describe his condition?

A. He was very much burned and he appeared to be dripping blood from all over, all the top part?

Mr. CHILDERS: I suggest that the witness testify either in one language, Spanish or English. We will be able to understand him better.

167 The COURT: Can you speak Spanish, Mr. Trujillo, better than you can English?

A. Well, just the same.

Q. Express yourself any better in it?

Mr. CHILDERS: I think that is his native tongue.

Mr. FIELD: I think you better speak Spanish, Mr. Trujillo.

Q. Well, what did you do then?

A. That is all, I just saw him there in the way that I said that he was burned—sick there—I at one time went with him into the tank to fix up a break in the tank.

Q. I am not talking about that?

Mr. MARRON: Let us have what he said.

Mr. FIELD: It was not responsive to my question.

Mr. CHILDERS: We want it.

Mr. FIELD: He said he went once into the tank to repair the tank with the plaintiff.

Q. But, now I am talking about this particular day, when you went there and found Joe Schmitt there, burned as you have described, what did you do?

A. Why, we started to work again.

Q. Well, did you go into the boiler house?

A. No, sir.

Q. Did you go into the cook room—the brewing room?

168 A. Yes, when they was cleaning up the stuff inside the brewery.

Q. Now, describe what you found in there, when you went in there?

A. Why there were a lot of grists right there below and some were

Q. What was the condition of the cooker?

A. It was somewhat broken.

Q. Much or little?

A. Why, some portions of the material could come out from the sides of the cooker.

Q. Describe the conditions which you found in the room there, when you went to clean up, as to where the contents of the tank were—what had been in the tank?

A. That the tank had? That the cooker had?

Q. Yes?

A. It was very much broken—that is all I noticed.

Q. Where was the mash and stuff?

A. It was all over the house, both below and up.

Q. Did you see Joe Schmitt's hands that day?

A. Yes, sir.

Q. What was the condition of the skin?

A. We worked that day—it was snow—there was snow on the ground that day and my compadre Pedro found all this hand including the nails.

Q. Where?

A. Outside, on the snow.

Q. What was done with that?

A. You mean the skin and the nails?

Q. Yes, what was done with that skin and the nails?

A. The doctor took one and the day before we were gathering grits upstairs and we found the other.

Mr. CHILDERS: What were you doing upstairs—upstairs?

A. No, down—we pulled them sacks up there with a horse.

169 Q. Do I understand you on the day of the accident outside on the snow you found the skin of one hand?

A. I did not find it—Pete Garcia found it, too, he showed it to me.

Q. And the next day you found the skin of the other hand inside the brew house?

A. No, outside.

Q. Where was Joe Schmitt the last time you saw him that day?

A. The same day?

Q. Yes?

A. He stayed there until the doctor came and took him home in a hack.

Q. Who went with him?

A. His wife went with him. I do not know who the other one was.

Q. When did you see him next?

A. Why, I saw him next at the hospital, but I was refused admittance, because he could not talk. I just seen he could not talk nothing.

Mr. CHILDERS: I object to that; he cannot know whether he could talk or not if he did not see him.

Mr. FIELD: I asked him when he next saw him.

Mr. CHILDERS: We do not want it in there.

The COURT: The jury are not to consider what was said to them about Schmitt's condition.

A. At the hospital—about 15 days.

Q. Do you know how long he stayed at the hospital?

A. No, sir.

170 Q. Do you know when he went back to work for the brewery?

A. Yes, but I do not remember the month.



Q. Now, I wish you would describe to the jury Jose Schmitt's condition at the time you saw him there in the bottling works after he was burned and tell the jury whether or not he seemed to be suffering pain and describe how he acted and let the jury understand it, as you saw it?

A. I got there from my home and I went in and he was badly burned all over and he seemed—and it seemed to me that he would not live.

Mr. CHILDERS: I object to that; as to how it seemed to him.

The COURT: I do not know whether he could describe it any better or not. Mr. Field asked him what Joe Schmitt was doing and how he acted and so on.

A. (Witness indicating manner by swinging his hands). He was walking about and he motions with his hands and afterwards, he was met by the doctor and some cotton placed on his face.

Q. Did he make any noise and what kind of a noise?

A. Yes, he made a noise. Then was stiff when he was put in the hack.

Q. I ask you whether or not at the time that you saw him there and from what you saw of his injury, you believed he was fatally hurt?

Mr. CHILDERS: I object to that as incompetent.

The COURT: Sustained.

171 Mr. FIELD: Exception, and I offer to prove by the witness that he thought that he was fatally hurt.

Cross-examined by Mr. CHILDERS:

Q. You say that you worked for the brewery how long?

A. 14 or 15 years.

Q. That is 14 or 15 years up to now?

A. Yes.

Q. You had been working about 13 or 14 years when this accident happened?

A. Yes, sir.

Q. What were your duties at the brewery?

A. To help about the brewery.

Q. In a general capacity you were employed in the bottling works or anywhere else?

A. Anywhere else, yes, sir, most any place—where I was placed to work.

Q. When you helped Mr. Schmitt, what were you doing?

A. I helped him to wash out the cooker.

Q. That is after he became a brewer?

A. Yes.

Q. Did you help him to do all that all the time?

A. Some times, I helped him and some times Henry had me in the cellar.

Q. When he put you in the cellar, who helped him?

A. Rudolph Zeigler.

Q. Did he always have somebody to help him to do that?

Mr. FIELD: I do not think that is cross examination and I object to it for that reason.

172 The COURT: I do not think Mr. Field asked him about that.

Q. How much of the time did you help Schmitt with reference to the cooker—with reference to the cleaning out of the cooker?

A. The three of them would clean——

Q. I am talking about the cooker now: Did you help him nearly all the time at cleaning out the cooker?

A. Not all the time, some time.

Q. Well, did you help him the most of the time?

The COURT: I do not know whether you are objecting to this, Mr. Field.

Mr. FIELD: Yes, sir.

The COURT: I will sustain the objection.

Mr. CHILDERS: Exception.

Q. You say you got there on the morning of the 2nd of January, what time?

A. About a quarter to seven.

Q. And you found Mr. Schmitt where?

A. I found him in the bottling works, when he was burned up.

Q. Was he standing up or lying down?

A. No, he was moving his hands that way—walking.

Q. Was he standing up or lying down?

A. He was standing.

Q. And throwing his hands around?

A. Yes, sir.

Q. Was he walking around?

173 A. Yes, sir; when the doctor came he got stiff and could not walk.

Q. That happened after the doctor came?

A. Yes, sir.

Q. And that was after the doctor had put cotton and medicine on the burn, was it not?

A. Yes, sir.

Q. He got stiff after the doctor came and put his applications on the burns?

A. Yes, sir.

Q. Who was that doctor?

A. Doctor——

Q. Do you know him?

A. I saw him that day; I forget his name.

Q. You didn't see but one doctor there, did you, that day?

A. Yes, sir.

Q. You mean that is all you saw?

A. Yes, sir; no more.

Q. How long after you first arrived there was it that the doctor came?

A. About five or ten minutes.

Q. The doctor made him lie down in order to make these applications, didn't he?

A. No; he only sat him down and placed these things I have stated, and then he was taken out and placed in a hack.

Q. He put him in a sitting position?

A. Yes, sir; that is all.

Q. And it was fully 10 or 15 minutes after you arrived before the doctor came?

A. Yes, sir.

Q. You said 5 or 10, I believe?

A. 5 or 10.

Q. Well, how long after the doctor came there was it before he was put in the hack and taken away?

A. I do not know; he was taken out and placed in the hack.

Q. You can tell about how long, can you not?

174 A. I cannot tell you, may be 10 minutes.

Q. You say he didn't have any skin on his hands when you saw him?

A. No, he didn't have.

Q. Do you mean that both hands were gone or that the skin was gone?

A. The skin and nails were. He had his hands——

Q. Now you found the skin off of one hand, where did you find that, the first one?

A. I didn't find it myself, my compadre, Pedro Garcia, found it.

Q. Where was that found?

A. Right on the alley there—the door of the brewery is this way, and the double-shut door is just straight—that way.

Q. Out of doors?

A. Yes, out of doors, on the snow.

Q. It was not inside of the cooker room?

A. No, sir.

Q. Could you see that it was just one piece of skin that slipped off the hand?

A. Yes, sir; they had it all out this way (indicating).

Q. Just like you had all the skin taken off one man, in one piece?

A. Yes.

Q. And the finger nails clinging to the skin?

A. Yes.

Q. All the finger nails off one hand—five?

A. Yes, sir; off of both of them.

Q. You didn't find both at one time did you—Pedro didn't did he?

A. No, the next day.

Q. Now, where did you find the skin off the other hand and the finger nails?

A. It must have dragged it some—it was almost the same place.

175 Q. The skin off the other hand was found in almost the same place—the same place on top of the snow, or under the snow?

A. The same place—it is under the snow.

Q. Was it snowing that morning?

A. It quit snowing—the snow stopped about that high (indicating).

Q. How high was the snow?

A. I do not know how many inches.

Q. You made a motion to indicate—now indicate with your hands how deep the snow was again?

A. About like that (indicating about 3 inches).

Q. But it was not snowing then?

A. No, sir.

Q. Now, you said something about blood there; what was that you said?

A. I stated when I went in there, it seemed to me, or looked to me as though blood was running down?

Q. Was there any blood running down?

A. Yes, sir.

Q. Now, you say that they were engaged in cleaning out the room in which the cooker is?

A. Yes.

Q. Who was engaged in doing that?

A. All the laborers were there cleaning up.

Q. Did you help, too, after you got there?

A. Yes.

Q. Now, was there a great deal of grits and stuff on the floor?

A. Yes, sir; I had my boots on and they were all covered with grits.

Q. Was there lots of steam in there at that time?

A. I did not see the steam.

Q. Now, you say the grits was on the floor?

A. Yes, sir; and above too.

Q. All the way up to the ceiling, the top of the room?

A. Yes, sir; up to the ceiling.

Q. All over the ceiling, everywhere?

176 A. Yes, sir.

Q. And on the sides of the room too?

A. Yes, sir.

Q. And you say there were holes in the cooker, on which side of it?

A. Yes, sir, it had, and I had helped Joe to fix it.

Mr. CHILDERS: I object to that.

Q. I am not asking about your helping Joe to fix it, I am talking about how it was after the accident?

A. I have stated already.

Q. Were there any holes in the side of the cooker?

The COURT: This day?

A. Yes, sir; it broke all over.

Q. That is, the bottom was broken loose from the side?

A. Yes.

Q. There were no holes in the side itself?

A. No, sir.

Q. Well, was the top broken open?

A. No, nothing but the bottom part.

Q. Was the man hole open?

A. That man hole is on too?

Q. Was that open?

A. I did not notice whether it was open or not.

Q. And did you observe the top of it? To see whether there were any breaks in that or not?

A. I didn't go in after—I do not know whether it was covered up or open.

Q. The top I am speaking about?

A. The top hole?

Q. The whole top of it: did you observe that that day: did you look at it?

A. I saw it.

177 Q. Was that intact? or was it broken open?

A. Just the bottom.

Q. And the man hole was fastened up there, was it or not?

A. I do not know whether it was covered or not.

Q. You say the doctor took one of these pieces of skin with the finger nail attached to it?

A. Yes.

Q. And you never saw Joe Schmitt from that day until about 15 days afterwards.

A. No, no sir.

Q. And when you saw him in 15 days, he was at St. Joseph's hospital?

A. Yes, sir.

Mr. CHILDERS: That is all.

LOUIS BOSSERT, introduced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Louis Bossert.

Q. What is your business?

A. Baker.

Q. How were you employed on January 1st, 1906, and immediately prior to that time?

A. I was employed by the Southwestern Brewery & Ice Co.

Q. What were your duties?

A. To work at the brew house and cold storage.

Q. Were you present at the brewery on the day when Joe Schmitt got hurt?

A. Yes, sir.

Q. What time did you get there?

A. About 15 minutes to seven.

Q. Well, who were there when you got there?

A. As I entered the yards, Mr. Sedillo, the firemen came towards me and broke the news that Mr. Schmitt got scalded.

178 Q. Well, what did you do?

A. I went right through the rear and as I came closer to the brew house, I saw that there was an accident happened, as the mash ran out of the doors and the windows was all open and steam blowing out through there.

Q. Well, did you see Joe Schmitt?

A. I then looked for Joe Schmitt and found him in the bottling shop.

Q. Who was with him, if anybody?

A. I do not remember of anybody being with him at the time I saw him when I came in.

Q. Well, was anybody else in the bottling works?

A. I could not tell—all I seen was Mr. Schmitt coming towards me when I came in there.

Q. Describe his condition?

A. When I came in there, he was holding his hands up like this—his fingers all stiff and walking back and forth across the floor and suffering great pain—then I seen—he showed his hands to me—there was all the skin off—and covered with blood, of course, and also the face—he had blood over his face and one side was scalded—the skin was off the face on one side. I asked him if he wanted any help, or if I could do anything for him, and he didn't seem to pay much attention to any question, he was suffering so great—that he didn't seem to want no help at all—he walked up and down—I tried to change his clothes for him—he said he didn't want it, as the clothes were sticking to his back.

Q. Where did you get the clothes that you tried to change?

A. Why, I didn't have no clothes there, but I sent to his house to get some.

Q. Well, who came while you were there Mr. Bossert?

A. Mr. Loebs.

Q. Which Mr. Loebs?

179 A. Mr. Henry Loebs.

Q. Anybody else?

A. The boys was all in a bottling shop then ready to work.

Q. Did you see anything of the doctor?

A. Yes, I had been ordered to stay with him until the doctor came.

Q. Who ordered you to stay with him until the doctor came?

A. Mr. Henry Loebs.

Q. How long was it after you got there before the doctor came?

A. Oh, every bit of 20 minutes.

Q. And after that you went to his house to get some clothes?

A. Yes, sir.

Q. Did anybody come back with you?

A. Not with me, but his wife followed me over; she kindly suspected that there was something wrong.

Q. What was done with Schmitt?

A. Why, as Doctor Carns came there in a hack he bandaged him up—his hands and face and then took him to the hack and we all went over, myself and the doctor and Mr. Abel and Louis—went

over—took him to his house—Dr. Carns and Mr. Abel and myself and Louis Markel.

Q. When did you next see Joe Schmitt after you left him at his house?

A. I saw him at noon time; he was asleep.

Q. Well, where did you next see him after that?

A. I saw him two weeks after the first time.

Q. Where?

A. In the hospital.

Q. Now, go back to the yard, after you left Schmitt at his house—you went back to work, did you?

A. Yes, I went back to work.

Q. What work did you do?

180 A. I was ordered by Mr. Henry Loebs to begin cleaning up around the place.

Q. What part; what place?

A. At the brew house, where the accident happened.

Q. Did you proceed to clean up the brew house?

A. Yes, sir.

Q. Describe the condition in which you found that brew house after the accident?

A. Why, the mash which the cooker contained was all over the floor and also on the sides, of course, on the ceiling, as the cooker was on the second floor—it went down and up again—the floor and the cooker was so close together—it had no other way to go on the sides.

Q. Well, it went all over——

The COURT: I think he will have to confine himself to what he saw.

Mr. CHILDERS: We object to that part of the answer in which he said it had no other way to go.

The COURT: That portion of the answer which said it had no way to go is withdrawn from the jury.

Mr. FIELD: To which I except.

Q. Describe the cooker?

The COURT: I suppose he saw something which led him to think that happened. If he is apt enough at description to tell what the appearances were, he can tell them.

181 Mr. FIELD: I think that is just exactly what he did.

Mr. CHILDERS: It seems to me that when he attempted to say why those things existed, it is something else.

The COURT: I have ruled on it.

Q. Describe the condition of the cooker?

A. Why, the cooker was broke out on the bottom on one side.

Q. Which side?

A. It was right—most to the front, where you face it.

Q. You say that there were part of the contents of the cooker on the walls and on the ceiling?

A. Yes, sir.

Q. Now, the conditions you saw there from them were you able to tell how that matter got on the walls and on the ceiling?

Mr. CHILDERS: Objected to as incompetent—he is not an expert.

The COURT: Sustained. I do not think there has been any evidence of the size of the room, how far the walls were from the cooker or the height of the ceiling.

Mr. FIELD: I except, and offer to prove by the witness from the conditions which he saw, that the grits, matter which he saw on the side wall and the ceiling must have been splashed up after hitting the floor.

The COURT: I do not see how that offer has much to do with it.

182 Q. Now, tell the jury how big this brew house was?

A. Well, to my judgment, I think it is about 25 feet wide and about 50 feet long.

Q. Where did this cooker sit?

A. This cooker sat on the second floor.

Q. How far was the bottom of the cooker from the floor of the brew house?

A. 15 to 20 feet, I suppose—from the first floor.

Q. Have you described what conditions you found on the upper floor, second floor, was?

A. Well, there was grits splashed around there, too—there was also some of the mash on the floor of the second floor.

Q. Did you see anything there that enabled you to tell how that mash got there?

A. Why the cooker sat right on the floor—it had no other way to get through.

Q. In the course of that cleaning up there, did you find anything of the skin of Schmitt's hands?

A. No, sir.

Q. Did you see them found?

A. Yes, sir.

Q. Who found them?

A. Mr. Garcia.

Q. What did he find?

A. He found one top skin of his hand with the nails.

Q. What was done with it?

A. They took it into the bottling works and wrapped it up with a piece of paper.

Q. Well, do you know what was ultimately done with it?

A. It was turned over to Dr. Carns.

Q. Did you ever see anything else of the same kind there?

A. No, sir.

Q. Did you see only the skin of one hand found?

183 A. I saw them both found—the second day they found the next one.

Q. Do you know what was done with that other one?

A. They found it on the floor in the yard.



Cross-examined by Mr. CHILDERS:

Q. I believe you said your trade was that of a baker?

A. Yes.

Q. You were engaged in working in the brew house and cold storage?

A. Yes.

Q. About the brew house?

A. Yes, sir.

Q. What did you do with reference to the brew house?

A. I was engaged in cleaning the kettle—the kettle room and all the belongings to it.

Q. Including the cooker?

A. The cooker, yes sir.

Q. Did you help Schmitt about the cooker, about the brewing?

A. I never helped in brewing.

Mr. FIELD: I do not think this is cross-examination.

The COURT: I think he can learn how he was employed there as bearing on his knowledge of the situation.

Q. What did you do with reference to brewing in the brew house, if any?

A. I got all the tanks ready from one day to the next, ready for brewing.

Q. Anybody else help to do that besides you?

A. Well, Mr. Schmitt done it when he was around, and at 184 times there was the other boys—just change about, however they had time.

Q. You got there 15 minutes to seven?

A. Yes sir.

Q. Was anybody else there besides Sedillo and Schmitt when you arrived there?

A. I met Sedillo outside and I met Mr. Schmitt in the bottling works.

Q. Was Mr. Trujillo over there?

A. Not that I know of—I have not seen him at the time that I seen Mr. Schmitt.

Q. Did you see him there that morning, at all?

A. Oh, yes, about seven o'clock, they were all ready to go to work—all the boys.

Q. You saw him with the others after they were all ready to go to work?

A. Yes.

Q. They were supposed to go to work at 7 o'clock?

A. Yes.

Q. And you got there about 15 minutes to seven?

A. Yes.

Q. You say that the steam—that the windows were open in the brew house?

A. The top—the second story windows—right by the cooker.

Q. When you talk about the second story in that room—the sec-

ond floor—you do not mean that the second floor extends clear across the room, but you refer to a platform there?

A. It is just half floor.

Q. On which the cooker sat?

A. Yes, sir.

Q. Now, you say that the steam was coming—there are two sets of windows, one lower set and one upper set?

A. No, there are no windows below.

Q. But they had the windows that were above open so as to let the steam out?

185 A. It was open when I came there. I suppose somebody was there before I was.

Q. That is the way you found it?

A. I found one of the windows open and I seen the steam and you could notice the steam pipe.

Q. The grits was all over the floor?

A. Yes, sir, all over the floor.

Q. Also on the walls?

A. Yes, sir, on the walls.

Q. And also on the ceiling, above the cooking kettle?

A. I know it was on the wall; I do not know that it was on the ceilings.

Q. Have you ever observed since to see whether any marks or anything of that kind—whether there are any indications of it there?

A. Why, there are some, of course.

Q. On the ceiling?

A. I have not seen any on the ceiling—on the walls of the second floor.

Q. Look at this plat—the La Driere plat: I will ask you if that about indicates what you call a second floor?

A. Yes.

Q. That is the platform on which the cooker sat?

A. This is what we call the second floor.

Q. You reach that from the first floor by going up here?

A. Up this step.

Q. Up this iron stairway?

A. Yes, sir; up this iron stairway.

Q. Is this the brewing kettle inside the brewing house?

A. Yes, sir, that is the brewing kettle.

Q. And that is the mash tank?

A. Yes.

Q. Do they set over each other?

A. Yes, just like that—tubes from one to the other.

186 Q. That about correctly represents it?

A. Yes, sir.

Q. The wall is not put on here: did you find these grits on both walls?

A. On the walls as far as up to this floor, and as far as on the top of this tank—this is lower than this one.

Q. This is lower—this one?

A. Yes, this is even with this here.

Q. Any grits over here?

A. This place over on the walls here?

Q. But you cannot say whether any on the ceiling or not?

A. No.

Mr. MARRON: Any grits on the wall above—on top of that cooker?

A. There was on the sides, all around this way.

Q. Even with the top of the cooker?

A. Yes, there were some.

Q. Even with the top of the cooker?

A. Well, there was as high—some of it was as high as the cooker; on one side the cooker stood close to the wall.

Q. But none above the top of the cooker?

A. No, not around there—I washed it off myself and I do not remember going up there to wash it—I had no means to go up there—it was not necessary—there was not anything up there.

Q. And there was none on the ceiling?

A. None on the ceiling.

Q. You are positive of that are you?

A. Yes, sir, I am positive.

Q. It was 20 minutes after you arrived there before Doctor Carns came?

A. Yes, about 20 minutes.

Q. When you saw him, he was in the bottling works—when you saw Schmitt—was he walking or standing?

187 A. He was walking back and forth and then went into the office.

Q. Where was he when Doctor Carns arrived there?

A. In the office with me.

Q. Loeb had come there in the meantime—Henry Loeb?

A. Yes, sir.

Q. And he told you to stay with him?

A. Yes.

Q. Till the doctor came?

A. Yes.

Q. Was Henry Loeb there before you came there or afterwards—or did he come afterwards?

A. I did not see him when I came there: he came into the office when I was in there with Mr. Schmitt and told me to stay there. That is all I know.

Q. You didn't see him until he came into the office to see the man Schmitt?

A. Yes.

Q. Dr. Carns at once proceeded to bandage him?

A. He bandaged Mr. Schmitt up, yes, sir.

Q. When you saw him at noon, he was asleep?

A. Yes, sir.

Q. You didn't notice his condition at all that night?

A. Never noticed his condition, except that he was asleep.

Q. And you never saw him until two weeks afterwards?

A. The first time I was admitted was two weeks after the accident.

Q. Now, you say the cooker was broken out at the bottom on one side?

A. Just on the bottom to one side—more to one side.

Q. There were no breaks in the sides then?

A. No, it was all on the bottom.

Q. You mean to say it was a breaking of the bottom away from the sides?

188 A. Yes, sir; that is all.

The COURT: I do not understand him: He said a break in the bottom on one side, I thought.

Q. On which side of the cooker was that break?

A. As close as I can tell you it broke right over this board to regulate these valves—that come closer out here, so as to reach it, and the break was right about here.

Q. Then it is on this side?

A. Yes, right on this side when you stand under it.

Q. On this side?

A. More on this side than over there.

Q. That is where the break was?

A. Right where this was.

Q. Right in the bottom?

A. Yes, sir.

Q. But it didn't affect the side?

A. No, sir.

Q. Did you notice the extent of that break in the bottom; how far from the side it extended?

A. I think the nearest where it came to the side was about an inch or an inch and a half.

Q. My question is, how far away from the side—inside?

The COURT: How big a piece broken out?

Q. Was there a hole in it or was it simply separated from the side was the hole in the bottom or simply separated from the side?

A. It was kind of pressed down—broke loose from right where the injured part was—worn through where they had patches put in—that is where it broke down.

189 Q. You do not know anything about any patches, do you—

Mr. CHILDERS: I move to strike that out.

A. That is where it was weakest.

Q. I am only asking you about what you saw?

A. That is what I saw.

Q. What I asked you was, how far from this side where you say the break was, right over that board there, in this direction, did it extend?

A. How far it extended this way?

Q. Yes, in this direction?

A. I think about a foot and a half, something like that.

Q. And commenced you say from about an inch of the side itself?

A. Yes, sir.

Q. Then there must have been a break in the bottom of the tank itself, was there not?

A. The iron cracked and broke.

Q. The iron broke through there?

A. Yes, sir; that is the way it looked to me.

The COURT: Does he mean it broke so it dropped free or simply that sprung down?

Mr. CHILDERS: Sprung down is the way he puts it now—broke in about an inch of this side and pushed down.

TERESA WITH, a witness introduced on behalf of the plaintiff being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

190 A. Mrs. Teresa With.

Q. Are you related to the plaintiff, Joe Schmitt?

A. I am a sister to Joe Schmitt.

Q. It has been testified here, Mrs. With, that Mr. Schmitt was brought to your house on the day of this accident and was taken from your house to the hospital; do you know how long he remained at the hospital?

A. He was not in my house after the accident happened; after the accident he was in his house and from there they took him to the hospital.

Q. Do you know how long he was in the hospital?

A. He was four weeks in the hospital.

Q. Then where was he taken?

A. Then he was taken to my house.

Q. How long was he at your house?

A. Four weeks again.

Q. And where did he go from there?

A. Then he went home to his house.

Q. Tell the jury what his condition was during the time he was at your house and up to the time he left to go home?

A. Why, he could not dress himself and except the last few days before he got home he could hold just a tiny little spoon.

Q. Do you know how long it was after this accident before he was able to dress himself without assistance?

A. I do not know how long, but I know it was about two or three weeks afterwards that he came and he said he could not dress himself anything yet, and after he was home, for the first week, he went to the doctor and his hands were so bad that he could not hold no spoon for a couple of weeks again.

Cross-examined by Mr. CHILDERS:

Q. You say he went to the doctor after he had been at your house two or three weeks and then could not hold a spoon?

191 A. No, he didn't went to the doctor at my house; he went home; after he was home the first week, the doctor wanted him to go to his office; it was such bad weather that he could

not go—too much cold—and he could not hold a spoon for a couple weeks again.

Q. That was about two or three weeks after he went to his own house?

A. No; the first week—right away—the first week he went home. In my house, he could not do anything—dress himself or anything, except the last few days, he could hold a little spoon.

Q. Let me understand you; before he left your house, and when he left your house, he could hold a little spoon?

A. The last few days, yes.

Q. And after he had been there at his house for some time he went to the doctor?

A. The first week, yes, sir; the doctor wanted him to go to his office and dress his hands and then it was so cold he didn't wrap up his hands and he caught cold.

Q. And then he could not hold a spoon?

A. After a couple of weeks again he could not do anything.

Q. That was the first week after he went home?

A. Yes, sir; the first week the doctor wanted him to go.

Q. Then for a couple weeks more he could not hold a spoon?

A. He could not do anything, no.

Q. After that—

A. I do not—he came up—I know his hand was very bad and was tied up and it was about three weeks before put a button or anything—close his pants—or anything—it was impossible.

Q. How long was it after he went from your house to his house that he came back to your house?

A. He came every day after he was able to get up—that  
192 his hand was able so he can walk out in the air.

Q. How long after he went to his own house from your house was it that he could walk around?

A. What is that?

Q. How long was it after he went from your house to his house before he could walk around?

A. He walked around in my house—the last few weeks.

Q. I mean go outside the house?

A. He walked outside around a little every day so he gets good use to the air, the last few weeks.

Mr. CHILDERS: That is all.

Mrs. JOSEPH SCHMITT, introduced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. State your name.

A. Mrs. Joe Schmitt.

Q. You are the wife of the plaintiff, Jose Schmitt?

A. Yes, sir.

Q. Tell the jury how long it was after Joseph Schmitt came to your house from his sister's house before he was able to dress himself, or feed himself without assistance, if there was any time.

A. It was about a month afterwards, before he could dress himself—help himself.

Q. How long was that after the accident?

A. How long—it was about two months.

Q. How long was he in the hospital?

A. Four weeks.

Q. And how long was he at home before he could dress himself and feed himself without assistance?

A. It is about a month.

193 Mr. FIELD: That is all.

LOUIS OVERMEYER, introduced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Louis Overmeyer.

Q. What is your business, Mr. Overmeyer?

A. Saloon business at the present time.

Q. How were you employed on the second day of January, 1906?

A. I was beer driver for the Southwestern Brewery & Ice Company.

Q. Was you at the brewery on the morning of the day when Mr. Schmitt was hurt?

A. Yes, sir; I got there about half an hour after the thing occurred.

Q. Who was there when you got there?

A. Why, Manuel Sedillo, the fireman—was there at the time—in the boiler house when I came there—when I passed the boiler house and Mr. Schmitt was in the bottling works by himself.

Q. Well, describe what you saw there.

A. Well, to start at the commencement, when I got to Second street and Fruit avenue, I met Mr. Fisher—Adam Fisher, and he was going over to Mr. Henry Loeb's house and he told me—I asked him what was the matter, and he says, why, something happened over there and Joe got badly hurt. I asked him what was the matter and he didn't tell me at the time—he went on; so I ran on as fast as I could over to the brewery to see what was the matter. I stated before when I passed the boiler house I seen Manuel Sedillo, the fireman in the boiler house—and when I stopped I seen the steam from the malt and stuff that was running out of the door.

I just had a thought about what happened but I did not know, so when I got to the door, the door was partly open and I seen all this mash and stuff laying there in the doorway, so I looked in the door, but I could not see anything inside in there, so I went on into the bottling shops; so when I got there I seen Mr. Schmitt walking back and forth. I asked him, what is the matter, Joe, what has happened. He says, why that bottom of the cooker blew—busted out, so I got scalded, and I seen when I faced him then—he came right up to me—that he had blood coming down over his face and his hands were somewhat blood stained, and

I seen that the skin was off of his hands and the nails were all gone—he held his hands in front of my face. So, then I asked him, the next thing, I asked him whether he had telephoned for a doctor; so he says no, that he had sent Fisher to Henry Loebs' house, and had telephoned for no doctor. So I said, well, I will telephone for a doctor then. I asked him what doctor he wanted, if he had any special doctor he wanted me to telephone to. He said no, telephone to anybody you wish. I did so. I telephoned to Dr. Carns. His wife came to the telephone——

Q. Never mind about that——

A. And called him—after, he came to the phone—she called him—he came to the phone and I talked to him and told him that somebody was scalded, badly scalded, and for him to come up at once. He said he would, and after that, why, it was about 15 or 20 minutes, he was not there yet, and I called him up again. He answered the phone again, and he said he would be right up, as soon as the hack came. He answered the telephone personally. So then after that, why, I stay in here with Mr. Schmitt until Mr. Henry Loebs came over there. So when Mr. Henry Loebs came, I went on out to the barn to get out my team and attend to my work.

195 After I had my wagon fixed up and everything on the wagon, about the time I was ready, why Doctor Carns came in the hack and that is all I know.

Q. Now, about what length of time elapsed between the time that you arrived there, Mr. Overmeyer, and the time that Doctor Carns arrived?

A. Judge it was about an hour.

Q. Now, describe to the jury the condition of Mr. Schmitt when you found him there?

A. Well, I came in there why, he was walking around there with his hands up like that (indicating), walking back and forth and was moaning, in the bottling shop and seemed to be in quite intense pain, suffering a good deal of pain.

Q. What was the condition of his hands?

A. Well, the hands were all red and blood over them.

Q. What about his face and hair, and his head?

A. Well, his head, why, he had blood partly over on one side, particularly—most on one side of his face, it was—the other side not so much, but he had blood over pretty much—over his face, by rubbing over with his hand, and also had the mash, or what you might call it, some of that substance on top of his head—on his hair.

Q. When did you next see Joe Schmitt after that day?

A. Why, I never seen him after that until he came out of the hospital.

Q. Did you see the skin of his hands?

A. Yes, sir.

Q. Where did you see it?

A. At the brewery.

Q. Who had it?

A. Why some of the brewery boys there had it, wrapped in



paper—had it in the bottling shop and showed it to me—came out and showed it to me when I hitched my team—after I seen what it was that was all I wanted to see of it.

196 Cross examined by Mr. CHILDERS:

Q. Who was there when you arrived there, did you say?

A. Why, Manuel Sedillo, the fireman, was in the boiler house when I came there—nobody in the room with him.

Q. Anybody with Sedillo or Schmitt?

A. Nobody with Schmitt.

Q. Did you see Mr. Trujillo there at that time?

A. No, sir; not at the time I came there.

Q. Did you see Bossert?

A. Not at that time.

Q. They came after you did?

A. They came after I did, it was about six o'clock when I came there.

Q. You got there as early as six o'clock?

A. About six o'clock.

Q. And you already met Fisher on the way to Henry Loebs?

A. Yes, sir.

Q. Was Fisher employed at the brewery?

A. Yes, sir; he was an ice driver.

Q. Where did you see Schmitt after you came out of the hospital?

A. Well, the first time I see him was on First street, at Palmer's store, coming along in a buggy with his nurse or whatever it was, a young man that was taking care of him—coming from the hospital I presume—that is where I first see him.

Q. Do you know when that was?

A. I do not know the time—just when it was.

Q. You mean the time of day?

A. No, how long after the second of January—I could not say how long after the second of January.

Q. Do you know whether he was still at the hospital?

A. I knew he was still at the hospital—that I knew as far as that is concerned.

Q. Did you talk with him then?

197 A. I did, I stopped for a few minutes and talked with him, and asked him how he was getting along.

Q. What did he say?

Mr. FIELD: Objected to as not proper cross examination.

A. Well, as far as I know, what he said—I asked him how he was getting along. He said, as far as I can say, I am getting along pretty fair—but, of course, his hands—his hands were all tied up.

Q. That is all that passed between you?

A. That is all that passed between us, because I never had much time to have much conversation.

Q. When did you next see him?

A. Well, the next time I see him was quite a while after, driving

along the streets, I think, in Mr. With's rig—that I seen him after that.

Mr. CHILDERS: That is all.

MANUEL SEDILLO, being first duly sworn, and introduced as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Manuel Sedillo.

Q. What is your business?

A. I am a fireman at the brewery.

Q. How long have you been a fireman at the brewery?

A. About 4 or 5 years, I think.

Q. Were you at the brewery on the morning when Joe Schmitt was burnt?

A. Yes, sir.

Q. What time did you get there?

A. I had been there since about half-past 4 o'clock.

198 Q. Do you know at what time the accident happened?

A. I think it must have been about half-past five.

Q. When did you first know of it?

A. At the same time—about that time in the morning.

Q. How did you find out about it?

A. Mr. Fisher told me about it.

Q. What did you do then?

A. I went out then to see.

Q. Tell what you saw?

A. Why, when I went into to where he was, he was all burnt.

Q. Describe how he was burned.

A. He had his hands and face burned.

Q. Any other part of his body burned?

A. I did not notice whether any other part of his body was burned.

Q. Was he burned much or little?

A. Why, a great deal.

Q. What did you do, if anything?

A. I did nothing else then—I just went back to my work and he remained in the bottling department.

Q. You didn't see him again that morning?

A. Yes, sir; I saw him afterwards.

Q. When?

A. When he had been attended to by the doctor, I believe.

Q. Do you know how long it was from the time of the accident until the time that the doctor came?

A. I think about an hour and a half, I believe.

Mr. FIELD: That is all.

Mr. CHILDERS: No cross examination.

MATTHEW RIDLEY, a witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

199 Direct examination by Mr. FIELD:

Q. What is your name?

A. Matthew Ridley.

Q. What is your business, Mr. Ridley?

A. You will have to have patience with me on account of my hearing.

Q. What is your business?

A. Boiler-maker.

Q. Are you employed as a boiler-maker?

A. Albuquerque Foundry.

Q. You are employed as a boiler-maker at the foundry?

A. Yes, sir.

Q. State whether or not, as an employé of the Albuquerque Foundry Company, you took an order from the Southwestern Brewery & Ice Company to repair a cooker—a beer cooker, in the month of December, 1905.

A. I was sent to the brewery by the Albuquerque Foundry to examine this cooker, as they call it.

Q. Well, did you do anything about the cooker?

A. I examined the cooker and found that it needed a new bottom.

Q. What did you do about getting it a new bottom, if anything, Mr. Ridley?

A. Gave orders to the foundry—the dimensions of material for a new bottom—according to the request of the brewery that was.

Q. Well, did the foundry get the material?

A. The material was ordered by the foundry.

Q. Now, do you know when the material was ordered by the foundry?

A. Well, at the end of November or the beginning of December, as near as I can say.

Q. That was in 1905?

A. Yes, sir.

Q. And the foundry didn't repair any other cooker for the brewery at that time, did it?

200 A. No, sir.

Q. Do you know whether or not that new bottom had been put in that cooker on the 2nd day of January, 1906?

A. No, sir; the bottom had not yet been put in on the 2nd day of January, 1906.

Cross-examined by Mr. CHILDERS:

Q. You say you found that it needed a new bottom?

A. (Witness unable to hear counsel).

Q. You say that you found it needed a new bottom?

A. The tank needed a new bottom, yes, sir.

Q. Who did you talk to about the cooker when you went to the brewery to examine it?

Mr. FIELD: I object to that as not cross examination. I brought

this man here for the sole purpose of identifying material about which Mr. Ray testified, and for no other purpose.

Mr. CHIDLERS: It seems he was brought here for the purpose of showing the need of a new bottom and I say we have a right to bring out all that took place when he went there and made the examination as part of the transaction.

The COURT: I think you could have him describe his examination in detail, if you wish to; he was not asked about any talk that he had there.

Mr. MARRON: He said an order was given.

Q. Who gave you the order?

201 The COURT: I thought he said the brewery company ordered it.

Mr. FIELD: I do not object to his asking who gave him the order.

Q. Who gave you the order for the new bottom?

A. The brewery company gave orders to the foundry. I am only an employé at the foundry.

Q. Did you receive that order as a representative of the foundry or employé of the foundry?

A. I had orders from the foundry to go to the brewery and examine this tank.

Q. Yes—how do you know that the brewery company gave orders to the foundry?

A. Well, only by the foundry sending me there. They would not have sent me there if the brewery had not given orders.

Q. That was simply an order for you to go there and make an examination of the tank, was it not?

A. I was to go there and examine this tank—see what was needed there, by the orders of the foundry.

Q. And see what was needed there; that is all that you know about any orders when you went there, was it not?

A. Well, when I went there, I found that the tank needed a new bottom.

Q. I am not asking you what you found; did anybody tell you that material for a new bottom had already been ordered before you went there?

A. No, sir.

Q. Whom did you report to that it needed a new bottom?

A. Who did I talk to at the foundry?

Q. Whom did you report the fact to that it needed a new bottom; whom did you tell that it needed a new bottom?

A. Well, wait a minute—I will tell you all right—Henry Loeb and I went inside of this tank—we looked around, and Henry says it needs a new bottom, don't you think; I says, yes, sir, it needs a new bottom very bad.

202

Q. Was it not Jake Loeb that you went in there with?

A. Jake Loeb, he was not there.

Q. He was not there at all; you didn't see him there that day at all?

A. No, I didn't see him the day I examined the tank. I do not remember seeing him the day I examined the tank.

Q. Did you ever have any conversation with him about the new bottom?

A. No, sir.

Q. Did you say anything either to him or to Henry Loeb that this bottom would last until the material came for the new one?

Mr. FIELD: I object to that as not cross examination.

The COURT: Sustained.

Mr. CHILDERS: Exception.

Q. Didn't you say to Jake Loeb at that time in effect that the bottom would last until the iron got there and we will put in a new bottom—

Mr. FIELD: I object to that as not proper cross examination.

The COURT: Sustained.

Mr. CHILDERS: Exception.

203 Q. Didn't you say you are sure that the cooker would be all right for six weeks until the other one comes?

Mr. FIELD: Same objection.

The COURT: Sustained.

Mr. CHILDERS: Exception.

Q. Were you not asked that, and didn't you say yes?

Mr. FIELD: Same objection.

The COURT: Sustained.

Mr. CHILDERS: Exception. That is all with this witness.

Mr. FIELD: That is the case for the plaintiff.

The hour of 5 o'clock having arrived an adjournment was taken until 9:30 a. m. on Monday morning, November 11, 1907.

And now on this 11th day of November, 1907, at 9:30 a. m. the trial of this cause proceeds pursuant to adjournment.

Mr. CHILDERS: The defendant moves the court to instruct the jury to find a verdict in its favor—I have prepared the motion in writing.

204 The COURT: The motion will be denied.

Mr. CHILDERS: Defendant excepts.

### *Defendant's Case.*

Thereupon Mr. Childers made an opening statement on behalf of the defense.

D. H. CARNS, introduced as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name.

A. D. H. Carns.

Q. Where do you reside?

A. Albuquerque.

Q. What is your profession?

A. Physician and surgeon.

Q. You are a graduate of what college?

A. Western University of Pennsylvania, medical department.

Q. How long have you been engaged in the practice of your profession?

A. Thirteen years.

Q. How long have you been engaged in the practice of your profession in Albuquerque?

A. About nine years.

Q. State what experience you have had in examinations and treatments of injuries resulting from burns or scalds?

A. I should say about—7 years—why, I was surgeon for two years for the Pennsylvania Railroad Company and practised in Homestead, near the Carnegie Steel Works, where we had considerable to deal with in things of that kind.

205 Q. In connection with the Pennsylvania Railroad Company did you have considerable experience?

A. Yes.

Q. I will ask you to state if you are acquainted with the plaintiff in this case, Mr. Joe Schmitt?

A. Yes.

Q. How long have you known him?

A. I have just known him since he was injured, I think January 2nd, 1906.

Q. Now proceed Doctor and tell in your own way and fully and completely, first—till I ask you other questions, your connection with the case and the treatment of the injuries received from the accident?

Mr. FIELD: There is a part of that question I wish to object to and a part I do not wish to object to and I think Mr. Childers would probably have no objection to dividing it and have him tell his connection with the case first before he tells of the treatment.

Mr. CHILDERS: No—

Mr. FIELD: I want to object to the evidence with reference to the treatment, but not with his connection with the case.

Q. State in the first place about your being called there and what you discovered—what examination you made—

Mr. FIELD: I object to what he discovered and what examination he made. As preliminary, how he happened to be there and the fact that he was called—the fact that he was employed to attend to Mr. Schmitt and that he did attend to him in pursuant to

206 that employment—I make no objection to that.

The COURT: Let us get that in.

Q. You can state that part of it first.

A. Well, it was early in the morning of January 2nd, 1906. I was telephoned for at my residence and asked to come to the brewery, that there was a man there that had been scalded. I re-

plied that I would come as soon as possible, and while waiting for a hack they came from the brewery—or some of the employes of the brewery came with a hack and I got in and went up to the brewery in the hack that they came in.

Q. Now where did you find the plaintiff when you got there?

A. When I got there, they were leading Mr. Schmitt in towards the office.

Q. You made an examination of his injuries there, did you?

A. Yes.

Q. Now state what examination you made and what you found his condition to be with reference to the injuries.

Mr. FIELD: As to what examination he made I make no objection; as to what he found his condition to be, I desire to object to.

The COURT: You better divide that.

Mr. CHILDERS: I do not see any reason to divide that question.

Mr. FIELD: I am prepared to put in objection to the whole question. I object upon the ground that the relations between  
207 physician and patient are confidential and public policy forbids the physician to disclose anything he discovers in pursuance of his employment in his capacity as physician.

Mr. CHILDERS: I do not care to argue.

Mr. FIELD: I do not either.

The COURT: It does not appear yet that there was any confidential relation established, unless by the very nature of the examination, it was established. It does not appear that the plaintiff sent for him

After argument:

The COURT: I will overrule the objection.

Mr. FIELD: Exception.

A. Well, I found him covered with this—part of his head—the top of his head and part of his forehead, with this malt—brew—with whatever that was they used to steam in the brewery—the stuff resembles a good deal a flax-seed poultice, as near as I can get to it—over his hands and face—not all his face—the upper part of his face, forehead and head——

Q. At that time you could not tell the nature of the wound on account of it being covered with this material?

The COURT: Mash, they call it.

Q. Yes, mash.

208 The COURT: You can call it mash.

A. His hair and all was sort of a mass of paste and it was impossible to tell the depth of the injury—the character of the burn at that time. He seemed to be in considerable pain. When I asked him where he had severe pain, he said his hands were paining him considerable.

Q. What was the next thing you did?

A. I put on a first aid dressing, until we got into the house. That is a gauze, picric acid gauze—comes in rolls of five yards, for convenience—I wrapped it up in that at that time.



Q. What, if anything, did he say about any burn or scald under his clothing, when you made the examination?

Mr. FIELD: I object to that as leading; I ask that the plaintiff's statement to the physician be given; I ask that the witness be required to state what the plaintiff said. Of course, this is all under my objection.

The COURT: Overruled.

Mr. FIELD: Exception.

Q. Go on Doctor.

A. Well, he didn't complain of any pain except his hands at this time. When I asked him where the pain was he said his hands were paining him.

Q. Doctor, I will ask you to state all the conversation that you had with him at the brewery, there, then, as near as you can recollect it upon any subject relating to his wounds or the accident or anything else that you may recollect up to the time that you removed—the house.

A. Well, it was—it was such a short time before we took  
209 him over—that I do not remember any conversation except in a general way, in a carriage going to his residence.

Q. Well, you may state that, if you recollect, what it was about.

A. Well, it was just in a general way—we talked going up about how the accident occurred and whether his pain was relieved or not, after we put these dressings on—and he complained—that he felt better—that is about the substance of it—as to the exact conversation, I do not remember—

Q. State whether or not he said how the accident occurred?

Mr. FIELD: I object to that as leading.

Q. Whether or not he said how it occurred?

Mr. FIELD: Does your honor pass upon my objection?

The COURT: I thought he had not fully answered the other question. I should let him answer the other question more fully.

Q. What, if anything, did he say as to how the accident occurred?

Mr. FIELD: I object to that question also.

The COURT: Overruled.

Mr. FIELD: Exception.

A. To the best of my recollection he explained that this cooker or whatever they call it, that something had happened there—that he didn't know exactly what had occurred, but that this mash  
210 came down on his head and over his hands and so forth—he didn't probably know how it did happen.

Mr. FIELD: Speak a little louder, Doctor, I cannot understand you.

Q. What was his mental condition when you found him there at the brewery and dressed his wounds—as to being rational or irrational, conscious or unconscious?

A. He was rational and conscious.



Q. After that, where did you take him, did you say?

A. To his home.

Q. How long did he stay at his home?

A. I think until the next day; I am not positive about that.

Q. When did you see him after you took him to his house?

A. Why, I saw—I went up to the house with him in the carriage.

Q. After that?

A. Then I scraped this stuff off and put on another dressing.

Q. I understood you to say that the dressing that was put on at the brewery was what you called first aid dressing?

A. Yes, sir.

Q. Did you change that before the next day—the same day?

A. I changed that the same day at his residence. At the brewery that morning, it was extremely cold and you could not dress it satisfactorily there.

Q. Did you make any further, closer examination of the injury?

A. Yes, sir; at the residence.

Q. State what you found to be the character of the injuries and describe them.

A. Well, I found there that the head was protected by the hair and that this had just burned superficially, and caused a burn of the first degree—that is, Hyperæmia or redness of the skull.

Mr. FIELD: What did you call that?

A. A burn of the first degree—that comes in the classification of the first degree burn, Hyperæmia. I found the left hand a portion of the skin of it had come off—just the skin had come off, like a glove in a mould.

Q. How about the other hand?

A. The other hand had formed vesicles or blisters as you would call them and part of that skin had sloughed off.

Q. Part of the other hand?

A. The right hand—

Q. All the skin of the left hand?

A. Not all—portions of the back were still intact but the palm of the hand—came off like a mould—like a glove.

Q. How about the finger nails on the hand?

A. Well, the little and ring finger and the middle finger, the nails came with it; the other two fingers at that time had not come off yet.

Mr. FIELD: Which hand is this that you are talking about?

A. On the left hand.

Mr. FIELD: You say the little and the ring finger?

A. And the middle finger.

Q. As I understand you, then, the finger nails of three fingers came off with the skin?

A. Yes, with part of the skin.

Q. The little finger and the two fingers next to it?

A. Yes.

Q. You said the others had not come off; did they come off subsequently?

212 A. They subsequently came off.

Q. Now, how about the finger nails on the other hand?

A. Well, I think most of those came off later, that is my recollection.

Q. State what is the natural effect upon the finger nails of injuries such as these are—and on the skin of the hand?

A. Well, what occurred—on this left hand—it is just like a poultice coming on there—it softens the skin of his hand—between the outside skin and the inner layer—the epidermis, or the true skin and that separated from the true skin of the hand, and he, by catching hold of the door knob or rushing against anything would separate that skin so that he might pull it off. I have seen it where the whole foot or leg came off in a mould.

Q. That is the skin came off?

A. Yes, sir.

Q. As I understand you, then, that would be the first skin—the first layer of the skin?

A. That would be the outside skin, yes, sir.

Q. You may explain to the jury the character of the outside, the second skin—the skin on the hand of the human body, if you will—especially explain to the jury the character of the skin on the hands of the human body, if there are two layers or more than two?

A. Of course, the skin is composed of different layers and when this scalding from this mash occurred, it had separated these layers from the inside skin, the true skin—the nails, of course, are a portion of the skin, and that is what occurred in Mr. Schmitt's case. This serum between the two skins, as the heat was applied there—it simply heated that serum between the two layers of skin and separated the different layers.

Q. Now, after this second visit which took place at the house and the second dressing, state what was done with Mr. Schmitt  
213 after that; relate all that took place after that that you remember in the way of your medical attention to him and what you say of him?

A. Well, my recollection was that, either that day or the next day—I am not clear in my mind—I did not look up any notes on it before I came up this morning—but it was either the day we took him to the hospital—whether that day or the next, is not clear in my mind just now, but Mr. Jake Loeb, the manager of the brewery, came to me and says, would Mr. Schmitt be any more comfortable at the hospital?

Mr. FIELD: I object to what Mr. Loeb said to him in the absence of the plaintiff and I ask that the jury be told not to consider it.

The COURT: The jury are not to consider what was said to him under those circumstances; it is hearsay evidence.

Q. It is no consequence what Mr. Loeb said now; what was done?

A. We removed him to the hospital.

Q. What hospital?

A. St. Joseph's hospital—the sisters' hospital.

Q. Now, you can answer the balance of the question; what was

done; go on and describe the course of treatment and the course of the case generally, all the way through?

Mr. FIELD: I wish to renew my objection simply for the purpose of saving the record.

The COURT: Overruled.

Mr. FIELD: Exception.

Q. Go on Doctor.

214 A. Well, he was put in one of the rooms there—the best rooms they had—he was put in one of the best rooms they had at the hospital and got a special nurse—a trained nurse, and this dressing we renewed whenever it was necessary, sometimes every day, sometimes not for three or four days; just as the case required.

Q. How often would you see him on the average, every day?

A. I would see him 2 or 3 times a day.

Q. Up to what period of time?

A. Up to the 28th of that month is the best of my recollection.

Q. What was done with him then?

A. Well, at this time, when he was at the hospital—of course, this wound is healing by granulation. It is the slowest process of healing we have—it would take time, and he was up and going around the hospital—and didn't want to stay there—he wanted to go home to his wife—so we removed him to his residence.

Q. What progress had the healing made up to the time you removed him to the residence—did you say the 28th. of January or February?

A. January—well, granulations had started on—all over both of his hands and his face and head were cleared up entirely, and the wound was in a condition to rapidly heal up and form that outside layer of skin that had been destroyed.

Q. What was the condition of his hair, as to any of it having been lost?

A. There was none of his hair lost, except what I cut off to get the mash out. I cut the hair to get the mash out of it.

Q. Now state what had been his condition at the time that you visited him at the hospital as to being rational, conscious?

A. Well, I saw him twice or three times a day and during his whole illness he was never delirious; this class of burns don't cause delirium.

215 Q. Then, the question was—I asked you whether he talked rationally or not?

A. Yes, sir; he talked perfectly rationally.

Q. After you took him home to his house—did you take him to his house first, or did you take him somewhere else?

A. We took him to With's. It was not his house. It was at another house on Mountain Road, With, I believe.

Q. You know how long he stayed there?

A. Well, I attended him there about four weeks more. I think; that is, I went out occasionally to see him.

Q. That is, you went as often as it was necessary?

A. Yes, sir.

Q. Well, what progress had the healing made during that time?

A. Well, the healing had progressed then until his hands were about well, with the exception of a little pus where a little infection occurred in between—in one or two of the hands. He came down to the office at that time and I noticed that—I explained to him that he could come every day and have that dressed in order to have them antiseptic—if not it would eat in here from the septic absorption and cause scars, and at this time I noticed his little finger and the one next were contracted from a congenital defect, called Dupuytren's contraction. I remarked to Mr. Schmitt at the time—I said to him you ought to have the deformity corrected now, and he said will it hurt much. I said no, we can anaesthetize that and use a small knife to reset those tendons and straighten them—straighten the fingers out. He remarked that the old lady was putting on some salve then and he was afraid this was going to hurt, and that he had had this all his life and didn't care about having it corrected.

Q. State whether this injury could have produced that—that contraction of the fingers.

A. No—the burn you mean?

216 Q. Yes.

A. No—in this kind of a burn it could not.

Q. Now, while you was at this house—I suppose there is no objection to saying his sister's—how often did you continue to visit him there?

A. Well, I visited him——

Q. I mean how long?

A. Well, about four weeks.

Q. Up to what time?

A. Well, that is some time in February, about the latter part of February, 27th or along there, 26th or 27th.

Q. When was it that he first come to your office?

A. Well, it was a few days later.

Q. Was there any reason for your visiting that house after that?

Mr. FIELD: I object.

Q. Was there any necessity?

Mr. FIELD: I object as leading.

The COURT: After when?

Q. What necessity, if any, was there for visiting at his house after you ceased to go there?

A. Why, not any necessity—it would be better for him to come to the office.

Q. How many times did he come to the office after that?

A. He came, it is my recollection, twice or three times after that.

Q. Do you remember when those times were; can you fix the dates?

A. Well, that would have been ten days after I had seen him at the house.

Q. Then that would make it about?

217 A. Well, the 8th of March—that is about the 8th of March.

Q. Did you say anything to him about coming there any more after that?

A. Yes, sir; I told him to come.

Q. What did he say?

A. Well, he said that the old woman was dressing it with some salve and he would not be down and then I met him on the street and told him he ought, better come if he didn't want to have unsightly scars where this pus was.

Mr. FIELD: Did you say he said he would not come?

A. Yes, sir.

Q. What did he say about that when you spoke to him on the street?

A. He said he was afraid it would hurt—he seemed to think I was going to correct this deformity in his fingers whether he wanted it or not and he was under the impression it was going to hurt.

Q. Now, doctor, while he was at his sister's—I believe I asked you that though. Then as I understand you that was your last connection with the case, when you met him on the street?

A. Yes, sir.

Q. And what condition was he in, except as to that deformity you have described—except those two fingers—was he in the last time you saw him to examine him?

A. As far as the usefulness of his hands was concerned, I think he was as good as before the injury—from a cosmetic standpoint or the looks of it, it looked unsightly—the scars.

Q. But what would have been the effect upon these burns if he had continued his visits to your office and continued the treatment?

A. Much better than it is at present.

Q. Do you remember having been approached by Mr. Marron at any time or Mr. Jacob Loebs, with reference to whether they could talk to him or not?

Mr. FIELD: I object to that. The conversations between Dr. Carns and Mr. Marron in the absence of Mr. Schmitt I should say are not admissible.

After argument:

Question withdrawn.

Q. I will ask you whether Mr. Jacob Loebs or Mr. Marron applied to you to ascertain the condition of the plaintiff about the 6th of January, 1906?

Mr. FIELD: To which I object because it is irrelevant and incompetent and is res inter alios actoe, and not binding upon the plaintiff.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Why, Mr. Marron called on me.

The COURT: I think you should answer that yes or no.

A. Yes, sir.

Q. What was his condition at that time?

The COURT: I thought you were going to ask if in consequence of that application he made an examination.

Q. Did you make any special examination in consequence of that application?

A. No, sir; it was unnecessary.

219 Mr. FIELD: I move to strike out the statement of the witness that it was unnecessary, because it is not responsive.

The COURT: That part can be stricken out; if he knew what it was he can say so.

Q. How often were you visiting him at that time?

A. Twice or three times during the day.

Q. The frequency of those visits was necessary—why was it necessary to visit him two or three times instead of once?

A. It was necessary, because they requested me to.

Q. Who were they, you say they requested you?

A. Mr. Jake Loeb and Mr. Marron.

Q. Did you or not, well know his condition at the time that this application was made to you?

A. Yes, sir.

Q. And at that time was he conscious and rational or not?

A. He was rational.

Q. I will ask you to state how much suffering, if any, the plaintiff underwent after about a week had elapsed from the date of the accident?

A. Well, for the first week, I imagine he had considerable pain.

Q. And after that?

A. Well, after that, not.

Q. How about pain caused by dressing the wounds after that?

A. Of course, the applications we make are supposed to relieve the pain—but he had—with a surface like that exposed, he would have considerable pain, even with the dressings.

Q. I will ask you if you had any conversation with Mr. Schmitt about the 7th day of January with reference to the release which had been signed the day before?

A. Yes, sir.

220 Mr. FIELD: I ask to have the time, place and persons present fixed.

Q. At the hospital?

A. Yes, sir; it was at the hospital.

Q. The time was fixed by the date of the month—who was present?

The COURT: Perhaps he can tell the hour of the day.

A. It was in the morning—the visit in the morning between 9 and 10 o'clock.

Q. Who was present at that time?

A. Well, one of the sisters—Sister Anthony, and myself, and Mr. Schmitt.

Q. Now state that conversation; what you said and what he said, in substance as nearly as you can recollect it.

A. The best I can recollect—I just bid him good morning, and examined his pulse and temperature, as usual, and as I was going out Mr. Schmitt told me that he had signed a release to the brewery people and that the substance of it was, that they had parted good friends, and that they had been good to him and he wanted to still work for them, that he was a brewer and that is about the substance of it.

Q. Do you remember whether or not anything was said about a good many people going after damages?

A. Well, I told—I probably, in a casual way, said that he was different from a good many people that get injured; that they usually went after damages.

Q. What did he reply, if anything, to that?

A. Well, he remarked that he was a brewer and he wanted to work for those people and he liked to work for them and they were good fellows and that he preferred the settlement he made to trying for any damage suit.

Q. I would like to ask you, Doctor, if you can state whether or not the capacity of the plaintiff has been—his earning capacity to work and use his hands has been impaired by the injury he had received and to what extent?

A. You mean permanently or temporarily?

Q. I mean permanently?

Mr. CHILDERS: Or, I will ask the court to request the plaintiff to let you examine his hands. I would like to have the doctor examine the plaintiff's hands.

A. (The doctor examining the hands of the plaintiff.) I would say yes, with the—well, of course, they are as good as they were before—as I explained this contraction—this Dupreytren's contraction—as it is called—is caused by the work he engaged in before—forming callous—formed here—on each one of these fingers (demonstrating on hands).

Mr. FIELD: Did you say they were as good as ever?

A. I say, for his capacity for work.

Q. I understand you to add to that—that contraction is caused—

A. It is caused by nothing from the burn at all. He had that before—a congenital deformity—sometimes it is caused by sickness—the skin grows to the under layer and pulls it up like that. In other words the cast that he had thrown, shows that.

Q. Then, as I understand, this comes from the character of the work he may have been doing—from the kind of tools handled?

A. It contracts the one up like that—just deforms it.

Q. What causes the callousness; that is what I am asking you; what may cause it?

A. Now, this deformity is caused by constant work—the callous comes in the different places on working men's hands—that would cause it and sometimes it is produced by disease—it is formed often



right here. Sometimes it is hereditary, congenital—it is under those places where the callous is formed (showing).

Q. When you saw Schmitt on the street I will ask you whether or not he said anything to you about having seen a lawyer?

A. I do not remember—

Q. In connection with your request to return to the office or anything of that kind?

A. I do not remember whether in the street or in the office—he mentioned that—in one conversation I had with him—that he had seen Heacock and he advised him to sue the brewery.

Q. What, if anything, did Schmitt say he was going to do?

A. Well, he explained that he was satisfied with the settlement he made—satisfied with the settlement he had made.

Q. I will ask you if you saw Schmitt since that time, that you met him on the street?

A. I met Schmitt, I think it was in some office in the Grant building about two months ago.

Q. Did you have any conversation with him about his hands?

A. Yes, I asked him how his hands were.

Q. What did he say?

A. He said very bad.

Q. What did you say to him about his hands?

Mr. FIELD: I object to that, what this man said.

Mr. CHILDERS: It is part of the conversation.

Q. What did you say to him that called out that reply?

Mr. FIELD: I object; it does not make any difference what he said.

223 After argument:

Mr. CHILDERS: I will change the question.

Q. State the whole conversation that took place between you and Schmitt at that time?

Mr. FIELD: To which I object on the ground that what was said by this witness is wholly immaterial in the case, and what was said by Schmitt is wholly immaterial unless it is an admission against interest.

The COURT: Overruled.

Mr. FIELD: Exception.

The COURT: State the conversation, that is, what each one said as near as you can remember it?

A. Well, I do not know that I can give the exact conversation; I can give the substance of it; I asked him how his hands were and he said very bad and I looked at them and I says, Joe, that looks like a good result—are you working—he says they are crooked. Well, I says, they have always been crooked. He says, oh, no. I says you told me so and the nurse so. He says, no. Well, I said, that cast that came off your hand when you were burned shows that they were that way—cast of skin—and he told me then something about—that he would show them—that he would sue them—that he had the best lawyer in town or something to that effect. That is about all.



Q. I will ask you to explain about that; about the cast that you referred to in that conversation?

A. Well, one of the boys at the brewery—one of the employés of the brewery brought it down to show me—I think the  
224 next day—the day after it was cast, and asked me if I wanted it; I told him I would like to look at it.

Q. That is the skin from the hand?

A. Yes, sir; I told him I would like to look at it to see about the condition of his hand beforehand, and this showed very plainly—

Mr. FIELD: You have that, have you not?

A. Not now.

Mr. FIELD: I object to what this showed unless it is shown that this is not in existence.

Mr. CHILDERS: We do not care for it; we will let it go.

Q. I am not certain whether I understood you or not as to which hand you said the skin came off when you first commenced treating him?

A. This cast was off the right hand—I believe I said the left but I would like to correct it, if I did, because it was the right.

The COURT: That is the cast that you saw that was brought to your office was from the right hand?

A. Yes, sir.

Q. If the plaintiff had returned to your office and permitted you to go on with the treatment the way you proposed, what condition would that — left his hand in, as to being better or worse than it was before the injury?

A. I believe if he had had that deformity corrected, that he would have had a better hand than he had before he was burned; I believe he would yet.

Q. Notwithstanding the effects of the burn, would it have been better or worse?

A. I believe it could be done yet. I believe it would yet.

225 Q. And reach that result?

A. Yes, sir.

Q. Be better than it was before the burn?

A. Before the burn.

Q. Did you ever make such a statement or not to Mr. Schmitt?

A. Yes, sir; I told Mr. Schmitt the last time he was in the office that I could perform tendon tenotomy, that is where you cut through a tendon—through the palmar fascia releasing the tendon.

Q. What did he say?

A. He said he didn't want it done, that it would hurt.

Mr. CHILDERS: That is all.

Cross-examined by Mr. FIELD:

Q. Who employed you to attend Mr. Schmitt?

A. I do not know who employed me; I was called from the brewery at that time.

Q. Who paid you?

A. The brewery.

Q. Well, what particular officer of the brewery?

A. I think the check was signed by Mr. Jake Loebs.

Q. Was Mr. Schmitt ever your patient?

A. Not to my knowledge.

Q. You never considered that the relation of physician and patient existed between you and Mr. Schmitt?

A. Yes, sir; sure.

Q. You say you graduated at a medical school—the medical department of the Western Pennsylvania University?

A. Yes.

Q. Did they teach ethics as part of the curriculum at that school?

226 A. Yes, sir.

Q. Did they teach you at that school that it was highly reprehensible for a doctor, or a physician and surgeon to disclose any information which he acquired in his professional capacity, to the detriment of his patient?

A. No; ethics required—no, ethics required that, except where venereal diseases were involved, or diseases of that sort.

Q. Are you aware that by statutory enactment in nearly every jurisdiction in the United States of America, except in New Mexico, such communications are forbidden by law?

Mr. CHILDERS: I object; in the first place I do not admit the fact. We will have to look the statutes up to see, and because that is a question of law.

The COURT: Sustained.

Mr. FIELD: Exception. I think I have a right to examine this witness as to what his ideas may be as to proper relations between a physician and his patient; and what duties a physician owes his patient.

The COURT: There is no objection to that; the objection was that you asked him what the laws were in the different states.

Q. Do you consider your obligations to the brewery company who paid you superior to that which you owed to Mr. Schmitt, who was your patient?

A. No, sir; I do not.

Q. Have you not in every way in your power assisted the counsel for the defendant in this case to defeat the plaintiff's recovery?

227 A. No; except to tell the truth.

Q. Did you not consult with them at times, and give them all the information you had about the plaintiff?

A. I have never consulted with them from the time I attended Joe Schmitt until I was subpoenaed as a witness—before they told me that I would be subpoenaed.

Q. Did you make a statement for them which was reduced to typewriting, and which was used by Mr. Childers in his examination of you here?

A. No, sir.

Q. You never told them what you were going to testify to until you told it here on the stand?

A. I told them I was going to testify to the facts, whether it suited Mr. Schmitt or suited the brewery.

Q. Well, now, for instance, we will take these conversations: Did you tell counsel for the defendant before you went on the witness stand here that Schmitt had told you that he had a conversation with Heacock, and Heacock said that he was going to sue them?

A. Yes, sir; I think after I was subpoenaed I told Mr. Marron that—since I was subpoenaed.

Q. Did you tell him also about all these other conversations which you have testified about here on the stand?

A. I have told him—just before I went on the witness stand, yes.

Q. Didn't you tell him before you were subpoenaed?

A. No, sir.

Q. As to every one of these conversations?

A. I do not think I did.

Q. Well, do you know whether you did or not?

A. I feel positive that I did not.

Q. Now, did you ever discover, Doctor Carns, that Mr. Schmitt was dissatisfied with the way you were treating him?

A. No, sir.

228 Q. You have no idea now that the reason that he didn't come back to your office was that he was dissatisfied with your treatment?

A. No, sir; he must have been a long time—he waited until he got well before he got dissatisfied practically.

Q. He waited till he got well?

A. Practically well.

Q. Well, you wanted him to come some more, and he told you he would not come?

A. Yes; that is, to correct the deformity he had before he got the burn.

Q. Well, the brewery had not employed you to correct any deformities he had before the burn, did they?

A. No, sir; but then a surgeon likes to correct any deformities he can find.

Q. Well, Mr. Schmitt had not employed you to correct any deformity of that character, had he?

A. No—but regarding his dissatisfaction, since I remember it—he employed me for one of his little girls after that; if he was not so well pleased with me I cannot account for that.

Mr. FIELD: I ask the court to strike out that statement of the witness as not responsive to any question I asked him.

Mr. CHILDERS: I object to it being stricken out.

The COURT: I think that is not responsive and it must be stricken out—the jury will not consider what he said about being employed to attend another member of the family; it was not responsive to the question.

Q. Well, now, I would like you to be as specific as you can, as to

whether or not when you asked Mr. Schmitt to return to your office and he declined to do it, you were asking him in your  
229 capacity as an employé of the brewery company or in your capacity as employed by him, or for your personal gratification?

A. Well, I say—I have a pride in correcting any deformities I find, no matter what the case may be. If a patient has any deformity—if called, I will call their attention to it. It was under those conditions I did it. The brewery company had not advised me to, nor had Mr. Schmitt.

Q. Then your professional relation with Mr. Schmitt ceased the last time he was in your office?

A. As far as I was concerned—unless he came back—yes?

Q. Did you charge the brewery company for doing anything for him after that date?

A. That I could not swear to—I do not remember whether I did or whether I did not.

Q. Do you keep books of account?

A. Yes.

Q. Do you keep any records of your cases?

A. If they are exceptional cases, and out of the ordinary, yes.

Q. Did you keep a record of Mr. Schmitt's case, which you made at the time—from day to day?

A. Nothing except the number of visits.

Q. You say that Mr. Schmitt had a trained nurse at the hospital?

A. Yes, sir.

Q. Is it the practice at that hospital, where a trained nurse is in attendance, on the patient, to keep a chart—a daily chart, showing the treatment the patient receives—showing the treatment and the patient's condition?

A. Yes, sir; I think so.

Q. Was such a chart kept in this case?

A. Yes, sir; I believe there was.

Q. Do you know where that chart is?

A. I do not—I suppose it is on the record or files of the Sisters' hospital.

Q. When did you last see it?

230 A. The last—the 28th of January.  
Mr. CHILDERS: 1906?

A. 1906.

Q. Can you tell the date, when Schmitt was last at your office—the day of the month?

A. I think I could by reference to my ledger—I could by consulting it.

Q. Without reference to your ledger?

A. I do not think I could.

Q. Can you approximate it?

A. No, I cannot.

Q. Can you tell whether it was later than the 28th of February, 1906?

A. Yes, it was later than that.

Q. How much later?

A. Well, I presume that it was two weeks later.

Q. That would be the middle of March, then?

A. Well, I judge so; yes.

Q. You can furnish us the exact date, can you not, Doctor, by consulting with your books?

A. I think I could, yes, sir.

Q. Can you tell us how much you charged the brewery company for taking care of Mr. Schmitt?

A. I could not without consulting my ledger. I did not make any note of that; it was somewhere between three and four hundred dollars.

Q. For an attendance which was at the most not exceeding ten weeks?

A. Yes, sir.

Q. And was probably less?

A. Probably less.

Q. There was not much the matter with Mr. Schmitt?

A. Well, he was scalded—his hands were scalded severely—externally, and required healing by granulation, which took time, as I explained—it is the longest process of healing that we have to deal with—healing by granulation.

231 Q. During the first week can you state whether or not you gave Mr. Schmitt morphine or other opiates to relieve the pain?

A. I believe I instructed the nurse at different times if he was suffering pain to give him a hypodermic of morphine—it would be natural—that is my recollection.

Q. Such a condition absolutely requires the administration of some opiate to relieve pain, in the early stages?

A. Any pain requires it.

Q. You do not quite mean that—do you give an opiate every time you have a patient in pain?

A. Not an opiate; we give an anædine if we are called on to relieve pain.

Q. Now, I will ask you if the condition in which you found Mr. Schmitt on the morning of the second of January and in which he continued to be for a week afterward didn't necessarily indicate—require the administration of morphine or some like opiate for the relief of pain?

A. I will say, yes.

Q. Can you tell this jury how often during the first week morphine was administered to the plaintiff in this case?

A. No, sir; I could not tell them how often.

Q. Can you tell the jury how often morphine was administered to Mr. Schmitt on the sixth day of January, 1906?

A. I think that I gave him an eighth of a grain myself, hypodermically, in the morning and once in the evening.

Q. In your opinion morphine does not affect the mental faculties of people?

A. It depends upon the idiosyncracies of the person—that is the

peculiarity of the person. I have known some persons that would be a little talkative—be more like a dream; others would  
232 vomit and get sick at the stomach, while others it would have a pleasant effect and would not affect them at all.

Q. You have known some in whom morphine would suspend the operation of the mental faculties for a while?

A. What do you mean by that?

Q. You have known people who would succumb to the influence of morphine?

A. In sufficient doses, they would go to sleep.

Q. Well, when a man was asleep from the influence of morphine you would say that his mental faculties were somewhat affected, would you not?

A. I would say that it acted as a sort of cerebro depression, in a way—it would not affect the mental faculties more than to quiet his mental system and put him to sleep.

Q. You think a man loaded up with morphine is mentally just as capable of doing things as a man who never had morphine a minute, would you?

A. In some people who create a tolerance of morphine, it will stimulate their mental faculties.

Q. When they reach that condition you call them fiends, don't you?

A. Well, it depends upon the tolerance. The best poems they say have been written under the influence of morphine.

Q. I ask you as a medical man, if, in your opinion, morphine is generally a mental stimulant?

A. Speaking generally, where an over-dose is not given, I would say yes.

Q. And a man then in your opinion, who had not taken an over-dose of morphine, but had taken, we will say, an eighth of a grain, administered for the relief of pain, would be in a better condition to enter into a contract—or determine the most important affairs of life, than the same man would be in a normal condition?

A. That would be—that would depend upon the susceptibility of the man. It is something I could not swear to as  
233 to any one individual.

Q. Do you think that Schmitt's hands are just as good for all purposes of work as they were before this accident?

A. Yes, sir.

Q. You don't think that in their present condition they would interfere with his performance of any labor, which he could have performed before the accident?

A. No, sir. Oh, yes—I think he would be just as capable of doing any work that he could, considering this other deformity, before.

Q. And you are sure that this cast showed that he had two fingers deformed?

A. As to two fingers—it showed, the little finger and the finger next to it, as I remember, didn't have the nail off—it didn't show a contraction, except very slightly—but it did show the little finger very much contracted.

Q. First, you got that cast off the left hand, and then you changed your mind, and then it was off the right hand; what caused you to change your mind?

A. The reason of that was I had pictured it in my mind, the palm—and remembered the palm side, and the position I was in there, when I was looking at it I thought it was the other hand, but I remember now positively that the palm was the right hand.

Q. Didn't you take that cast into your possession and put it in alcohol?

A. I put it in formaldehyde and kept it until I was cleaning out a lot of specimens and one day threw them away.

Q. You had it?

A. I had it and showed it to a number of people.

Q. When was this you threw it away?

A. Well, it was not very long ago.

Q. About how long ago?

A. Well, that I could not say.

234 Q. Can you approximate the time?

A. No, I cannot.

Q. Was it three months ago, or three weeks ago?

A. No, sir.

Q. A week ago?

A. Well, it was not a week ago—it was two or three days—I do not know—

Q. Since you were summoned as a witness in this case?

A. Yes, sir; since I was summoned as a witness.

Q. Where did you throw it, Doctor?

A. I threw it down the back part of the building, there.

Q. It is gone beyond recovery, is it?

A. It is all but that little finger, and the one next to it; I think I have that yet.

Q. Well, you didn't throw it all away?

A. Not all of it, no, sir; I didn't throw very much of it away—there was not very much more than that I have—

Q. Didn't you tell us it was the whole palm?

A. No, not the whole. Wait a minute—

Q. And the skin of the back—the little finger and the ring finger—

A. Yes—the ring finger and the next finger, and this finger—(showing) with the nails, and this one—the nail was still on the end, and this one and the palm to about there (indicating). Now, this other part I gave to Doctor Kauffman—to show him this deformity—told him it was brought in there by one of the boys from the brewery—he says, what do you want that for—and said he would like to keep it as a specimen—that is how we come to have it—

Mr. FIELD: I object to the latter part of the answer and move to strike it out.

The COURT: What he gave to Doctor Kaufman and what he said to him about it is not responsive.

235 Q. You remember now having seen the skin of the left hand?

A. I saw the skin of the left hand on his hand, yes, sir.

Q. You never saw a cast of the left hand?

A. No, sir.

Q. When you were in attendance on Mr. Schmitt at St. Joseph's Hospital didn't you give instructions not to permit people to see him?

A. Not to my knowledge.

Q. You saw no reason to give instructions that anybody who wanted to see him, should not see him, and gave no such instructions?

A. Yes, I saw a reason, but I did not give instructions: I see no reason in all those accident—acute accidents, not to permit anybody to see the patient: It was a standing order of mine, but I would have done so had I thought about it.

Q. If people were refused permission to see Mr. Schmitt it was probably because you did give such an order and forgot it?

A. It was probably because it is a standing order of mine at the hospital—not to permit anybody to see my patients in acute accidents, or where they are seriously sick.

Q. Schmitt's condition was such as to bring him properly within that category?

A. At that time, yes; it was an acute accident.

Q. I mean for the first week at least?

A. That is, for the first few days—probably two or three days.

Q. Not for the first week?

A. Not necessarily for the first week.

Q. When you are giving morphine twice a day to relieve pain, you think as a medical man it is proper to permit patients to see persons indiscriminately?

A. I did not say I had given him morphine twice a day—except the first day I gave it to him, and I frequently have had patients that I gave morphine every couple of hours and still permit their friends to call on them.

236 Q. I understood you to testify on your cross-examination, and if I am mistaken, I want you to correct me about it—that on the sixth day of January you personally administered to Mr. Schmitt two hypodermics of morphine, each one-eighth of a grain of morphine, one in the morning, and the other in the afternoon?

A. Yes, sir.

Q. You also testified that you didn't know and could not tell how often morphine was administered to Mr. Schmitt during the first week?

A. No, sir.

Q. That your instructions to the nurse were to give morphine whenever necessary to relieve pain?

A. Yes, sir.

Q. And the nurse's chart showed each day, how many times each day morphine was administered?

A. It should.



Q. I am talking about the custom—not about this particular case. You don't remember what the chart showed?

A. No, sir; it should show.

Q. That is just what I want; that the chart kept by the trained nurse should show exactly what medicines were administered and at what hour?

A. Yes, sir.

Q. Who was this trained nurse?

A. I do not remember her name. It is my recollection that they had a new force there about this time, and then in this particular case I do not remember who was on duty at this time. There are various nurses going in and out there and they take turns, day and night—sometimes they switch them over—they won't allow the same nurse there all the time.

Q. Do you know whether the nurse who had charge of Mr. Schmitt was a man or woman?

A. Well, at the hospital—Sister Anthony was the trained  
237 nurse—she attended to him partly there and a male nurse named Millet attended him after he left the hospital.

Q. Where is Sister Anthony now?

A. Sister Anthony—I believe she is in Cincinnati now.

Q. You are sure she is not at the hospital?

A. I am not sure—she may be—but she was assigned at Cincinnati this last time—at least Sister Alexander, the Superior, told me so.

Q. Sister Alexander is the Superior, and Sister Anthony was the nurse in charge of Schmitt according to your recollection now?

A. Yes, sir.

Q. Was she the only one who had charge of Mr. Schmitt?

A. Sister Anthony was the principal one; that is she had charge of that ward—I mean that floor.

Q. Well, there was not even a separate nurse for Mr. Schmitt, but Mr. Schmitt participated with the other patients in the services of nurses provided for that floor?

A. Yes, sir; he had other nurses, but whether they were special or not, I do not know.

Q. I understand you to say, Doctor, that burns of this character never produce delirium?

A. Yes, sir.

Q. I will ask you, as a medical man, if it is not true that excruciating pain, produced by any cause, is liable to produce delirium; the pain, not the burn?

A. Well, that would depend upon the nature of it—where the pain was. If they are wounds of the head, where you have complications with the brain, I would say yes, but from excruciating pain—the most excruciating pain perhaps you can think of is to have a tooth extracted, yet it never makes a person delirious.

Q. I will ask you as a medical man to answer this question categorically—yes, or no. Is it not possible for severe pain to  
238 produce delirium no matter how the pain may be superinduced?

A. I cannot answer that.

Q. Why: because you do not know?

A. Because it depends upon the class of pains, whether long continued pain and whether there is septic absorption with the pain, and whether you are going to have complications with the cerebrum and everything of that sort—where the pain is, and what the condition is that produced the pain. You might take a severe headache—I would say at times will produce delirium.

Q. I will ask you if there are any persons with whom morphine produces delirium?

A. Yes, there are: Patients with idiosyncracies—most any drug will at some time make them a little off.

Q. Is there such a condition as partial delirium?

A. There is a condition of mild delirium that would probably come under the same heading.

Q. What is the distinction between delirium and delusion?

A. Well, that is a pretty hard question: A person who is delirious might have a delusion—might be delirious and have delusions—what causes that is due to the pain centre affected. A man may have what is called word-blindness—may know what he wants to say, yet he cannot say it.

Q. Now, Doctor, my whole object in this branch of the cross examination is to ascertain from you just exactly what you intend to convey to the jury when you say that wounds of this class never cause delirium: I want to know if pain produced by such wounds might not produce delirium although ordinarily the wounds themselves would not?

A. Wounds like he had: I would say not—no.

Q. Would you say that the fact that his head was burned as it was, taken in connection with the condition of his hands, and the very severe pain to which he was subjected—would you declare as a medical man that it was impossible that he could have been delirious at any time, while he was under this treatment?

A. From the wounds: I would say no; that it would be impossible.

Q. I will ask you if all the causes which might produce delirium in his case—if there were not any causes in his case, in burns of that class, which would not cause delirium?

A. A man delirious from burns usually dies: That is the usual result of a delirious man.

Q. Would you say that a man who did not know his own wife and his sister was delirious: What would you ascribe that condition to?

Mr. CHILDERS: I object to that as not proper cross examination. There has not been shown any such state of facts upon which to predicate that question.

A. I would say he is crazy.

Mr. FIELD: This is an effort to find out what this man means by the use of the word delirium.

The COURT: I think I will allow the question.

Mr. CHILDERS: We except.

Q. (Repeated.)

A. I would think that he was either a fraud or delirious or crazy if he didn't know his own wife or daughter.

Q. When a patient is in such a condition as — to be able to recognize people by whom he is surrounded, although he knows  
240 them, what would you describe that to be: Would you describe that as a condition of delirium?

A. Well, that would be—I would answer that the same way; that he would be delirious or crazy, or be shamming.

Q. You understand my question relates to the genuine condition of the patient; not a patient who is shamming?

A. I will answer that, it would have to be, unless he had these other conditions, yes.

A recess was here taken until 2 o'clock p. m.

Dr. CARNS resumes the witness stand for further cross examination.

Q. Did you or not consult your books and fix the date of the last visit of the plaintiff to your office?

A. Yes.

Q. When was that?

A. March 8th, 1906.

Q. Have you ascertained how much you charged the Brewery?

A. Two hundred and ninety-eight dollars.

Q. Did you ascertain how many visits that was for: Did you charge by the visit?

A. I charged for the first dressing, ten dollars for that, and two dollars a visit afterward.

Q. Then, between the second day of January, -906, and the 8th of March, 1906, you visited Mr. Schmitt in your professional capacity, or he visited you, one hundred and forty-four times?

Mr. FIELD: Question withdrawn.

Q. How many times?

A. Well, that would be that many times and counting ten dollars for the first dressing—the first visit.

241 Q. You stated it was two dollars a visit?

A. Yes, sir.

Q. Well, how many of those visits you made in March, do you know?

A. Not any made in March except his visit to my office—there were no house visits.

Q. Do you know how many times he came to your office?

A. Three times.

Q. That was during the month of March?

A. Yes, sir.

Q. You charged two dollars a visit for those visits?

A. I did not charge anything for those visits: I sent my bill on the first of March and these were brought in afterwards—on the first of March, I supposed he had quit coming, and I sent the statement—and then the others were small and I did not consider them.

Q. Well, then, in fifty-seven days—that was the number of days between the accident and the first of March, was it not?

A. Yes, sir.

Q. You found it necessary to visit this plaintiff in your professional capacity one hundred and forty-four times?

A. I did not find it actually necessary—but they required—the brewery people asked me to see him often and to watch him carefully.

Q. Well, you didn't go any more frequently than was necessary, did you?

A. No—to suit them—there were days that I made three, there were days that I probably saw him four times—three times, and later twice and then once a day.

Q. Did you think it was necessary at any time while you were treating this man to tie him in bed?

A. No, sir; he was never tied, to my knowledge.

242 Q. And if he was tied, you don't know anything about it—you did not know anything about it?

A. If he was tied, I do not know: It was against any orders I ever gave.

Q. What was the name of this nurse who had charge of him while he was at his sister's house?

A. Milet: Thomas Milet.

Q. Where is he now, do you know?

A. Why, I think he is still at the hospital.

Q. He was there the last you knew of him?

A. Yes, sir.

Q. If he tied this man in bed at any time, it was contrary to your instructions?

A. If he tied him any time it was beyond my knowledge: I never knew of it.

Q. Do you know whether or not he kept a chart?

A. I do not think he did: I never saw a chart that he had kept.

Q. Did you authorize him to administer morphine to Mr. Schmitt?

A. No, sir; I do not remember of having.

Q. If he administered morphine to Mr. Schmitt he did it without your authority?

A. If he did, he did it without my telling him to: I do not remember of him ever telling of him requiring morphine after he left the hospital.

Q. Do you remember whether you ever gave him any morphine after he left the hospital?

A. I never gave him any.

Q. How many times did you give him morphine on the first day and in what quantities, if you remember?

A. To the best of my recollection, I gave him an eighth of a grain after we got him to the house, and that night—that was on the 6th of January—?

Q. I mean the 2nd of January?

A. Yes—the second of January.

Q. Now, have you not a present recollection about that, Doctor?

243 A. Yes, sir.

Q. Twice on the day of the accident then, as I understand, you, you gave him morphine, and an eighth of a grain?

A. Yes, sir.

Q. Always administered hypodermically, was it, Doctor?

A. Yes.

Q. How many times did you give him morphine on the next day?

A. I didn't give him any on the next day: He was in the hospital the next day.

Q. Do you know whether or not he was given morphine in the hospital the next day?

A. No, I do not: I instructed Sister Anthony that if he was restless or in pain to give him morphine whenever required; she has had instructions never to give any if it is not necessary—I was willing to trust her with that.

Q. Well, whether it was necessary to give him morphine or not the next day, you do not know?

A. No.

Q. Well, how about the following day?

A. Well, after he had—after he had the dressings put on and excluded the air, my opinion is that he would not require morphine unless it would be for his restlessness and nervousness.

Q. Well, I am asking for facts, Doctor: Do you know whether he was given any morphine on the third day?

A. I do not recollect of his being given any.

Q. Well, do you recollect whether he was given any or not?

A. No, I do not know whether he was or whether he was not.

Q. Well, how about the day after that: do you know whether he was given any morphine on that day and how much?

A. I do not know.

244 Q. Do you know when you ceased to administer morphine to him at the hospital?

A. No, sir; the instructions were to give him the required amount of morphine that he needed to quiet him.

Q. In other words, the case was one in which a high degree of pain and a large amount of nervousness was to be expected and indicated morphine treatment when necessary to allay the pain and quiet the nerves?

A. Well, in those injuries, of course, some will require morphine while others will not, apparently have the same hyperthetetic condition—they won't require much morphine—some people want morphine that are hysterical and have no trouble.

Q. But, now I am talking about this case of Mr. Schmitt's; when you instructed the trained nurse, Sister Anthony, to give morphine whenever required, you gave those instructions because the case was one which indicated the probable necessity for morphine treatment?

A. Yes, sir; probably.

Q. And you left the amount and the frequency of the administration to the discretion of the nurse?

A. To Sister Anthony's discretion——

Q. Yes; that is what I mean: you have testified here on direct examination to four conversations with the Plaintiff, have you not?

A. I believe I have: I am not sure.

Q. Well, I want you to correct me if there was any to which I do not call your attention: the first one in the carriage going home after the accident?

A. Yes, sir.

Q. Who was present in that carriage besides you and Schmitt?

A. I do not remember; there was some brewery employé there; I do not remember who he was.

Q. Weren't there two brewery employés?

245 A. There may have been, yes, sir; there may have been.

Q. Do you know a man by the name of Louis Bossert.

A. No, sir; I do not know him—I know a fellow Louis.

Q. Who is that——

A. George Abel's brother is that?

Q. I do not think he is—you are thinking of Louis Overmeyer—Bossert?

A. I do not know Louis Bossert.

Q. Didn't Mrs. Schmitt go home with you in that carriage?

A. I believe she did—I do not know whether it was Mrs. Schmitt—I believe a lady went home with us.

Q. You say that on that occasion Schmitt undertook to tell you what had happened?

A. At my request, yes—I asked him where he had the most pain and he described that he had the pain in his hand—and I asked him how the accident occurred and he explained something about the cooker, or something they had there—about this material splashing over him—the steam and so forth.

Q. Now, you are positive that he talked to you in the carriage going home and attempted to tell you how this accident happened?

A. By my request, yes, sir.

Q. And there were in the carriage besides yourself a man and a woman and Mrs. Schmitt?

A. There may have been, that is a circumstance I could not swear to: I do not remember who was in: I know there was several persons with us, whether it was his wife or who—I think the four seats in the carriage were occupied.

Q. Well, don't you know that at that time this man was almost in a comatose condition and his wife was crying and saying that he was going to die and that he didn't talk at all?

246 A. I know that he was not anywhere near a comatose condition: I know that his wife was crying—or the lady that was there—I do not know whether it was his wife or not.

Q. And you know that he tried to tell you how the accident happened?

A. Yes.

Q. At your request?

A. Yes, sir.

Q. Now, the next conversation you testified about was on January 7th?

A. I do not know what I testified to the time of the conversation—I do not recall dates that far back.

Q. Well, I—

A. I believe the day after he signed the release and I think that was on the 7th—we had a conversation that day.

Q. You fix it by the time the release is signed and not by your memory of the dates?

A. By the fact he said he had signed a release—yes, sir.

Q. Did he tell you he had signed a release on the 6th of January?

A. He told me the day before—Mr. Childers suggested that this morning—that it was the sixth.

Q. Now, you say that you had a conversation with him on the day after the release was signed at the hospital?

Q. In the morning?

A. Yes, sir.

Q. Who was present at that conversation?

A. Well, my recollection was, Sister Anthony and Mr. Schmitt—Sister Anthony was in the room when I went in and Mr. Schmitt, of course, was in bed.

Q. And there was nobody else present?

A. Nobody else present, to my recollection.

Q. When did you first report that conversation to the defendant in this case, or to its counsel?

A. I do not know that I ever did; except I may have mentioned it after I had been subpoenaed—when they had me in Mr. Childer's office—I may have—I do not know that I did.

Q. When were you subpoenaed, Doctor?

A. I was subpoenaed, I think it was—let me think a minute—some day last week—some day the latter part of last week.

Q. Was it last Thursday night that you were in Mr. Childer's office?

Mr. CHILDERS: It was the day that the jury was impaneled.

A. I think it was last Thursday night.

Q. You did go to Mr. Childer's office then and did make a statement then which was taken down?

A. After being subpoenaed, yes, sir.

Q. Now, between the time that you held the conversation with Joe Schmitt at the hospital on that morning and last Thursday night when you were at Mr. Childer's office, you had never repeated that conversation to anybody?

A. I may have done so, but I do not remember having done so.

Q. Well, if you did, to whom did you repeat it?

A. Well, I do not remember of repeating it to anybody.

Q. Do you remember very distinctly the conversation—everything that Schmitt was supposed to have said?

A. Just in a general way. I do not remember positively that—

Q. You made no memorandum of the conversation at the time, did you?

A. No, sir.

Q. And you say in that conversation Schmitt told you that he had settled with the brewery company?

A. That he had signed a release, yes, sir.

248 Q. And you suggested to him that most people would have wanted damages?

A. I suggested to him that most people injured in the east around factories and so forth, usually sued for damages, yes, sir.

Q. And he told you that he didn't want any damages; he just wanted to go on with his job at the brewery, that these people had been good to him and he wanted them to pay his expenses and give him his job back when he got well?

A. That is about the substance of the conversation.

Q. Did he say anything about who was present when he signed that release?

A. No, I didn't ask him anything about it.

Q. Did he tell you what time of the day he signed the release?

A. He said, yesterday.

Q. Now, do you know whether you had given him a dose of morphine before you had that conversation with him that morning?

A. I know I had not.

Q. Do you know whether you gave him a dose of morphine afterwards?

A. Yes, sir, I know that I did not give him one.

Q. Do you know whether he had morphine from anybody else?

A. Not to my knowledge, he had not.

Q. Do you know whether he had, Doctor?

A. I could not swear that I do.

Q. However, you are positive that you never communicated that knowledge to the defendant or its counsel until you did so last Thursday night at Mr. Childers' office?

A. I am not positive: I do not remember having done so.

Q. Now, the next conversation you say you had with Mr. Schmitt was at some office in the Grant Building?

249 A. Yes.

Q. Did you have more than one conversation with him in the Grant Building?

A. No, sir.

Q. That was the conversation in which Mr. Heacock's name was mentioned?

A. No, I do not think it was—I think that was on the street.

Q. I thought I might be confused about that myself: now, that was not the next conversation that was had—the next conversation you had with Mr. Schmitt, was a conversation in which Mr. Heacock's name was mentioned?

A. No, I think that was prior to this conversation—because this



one you mention now was just recently—just probably six weeks or two months ago.

Q. We are in a little confusion over this—just dismiss the Grant block conversation for a moment: I want the next conversation you had with the plaintiff after the conversation at the hospital, about which you have testified here and in which according to my recollection, Mr. Heacock's name was mentioned?

A. I have not a very vivid recollection of that. My recollection is not very vivid regarding that conversation: It came up—I think there were—I know that before I left the house—finally before I left the house, this Tom Milet, the nurse was present one time when we were speaking about straightening those fingers, and he mentioned again something about this deformity—and whether this Heacock conversation was in that or when I met him on the street is not very vivid, but there is one time I talked to him that he said he had seen a lawyer and he had advised him to sue the brewery and I mentioned something, I recollect about his releasing them—if that would not bar him, or something of that sort, and he mentioned that Mr. Heacock had stated something—that that did not go—didn't cut any ice, or something of that kind—that is the substance of it.

250 Q. That is not responsive to my question: I did not ask for that.

Mr. CHILDERS: I would like to have that go to the jury.

Mr. FIELD: I have no objection to its going to the jury.

Q. Now, when you testified this morning on direct examination about a conversation in which Mr. Heacock's name was mentioned, don't you know that you didn't say anything about the nurse being present, or anything about getting his fingers straightened in connection with that conversation?

A. I do not believe I did.

Q. Well, then you weren't answering the question that I asked you when you volunteered this additional conversation at which Tom Milet was present and in which the question of straightening his fingers was mentioned?

A. I was trying to call to mind which conversation it was: I have had quite a few conversations—practically every day I would see him, we would talk about something—and it would be pretty hard to define just exactly on what occasion that was—that is to swear to.

Q. Well, you understand, don't you, Doctor, that when I am cross examining you about conversations which you testified about on your direct examination, that I do not desire you to volunteer testimony about other conversations, about which you didn't testify?

A. No, I do not.

Q. Well, please bear that in mind—and if you can fix me the time and place and the persons present, when you had any conversation with Joe Schmitt in which the name of Heacock was mentioned, please do so?

A. I cannot.

Q. You cannot fix the time?

A. I cannot fix the time, no, sir.

251 Q. And you cannot fix the place?

A. I could probably fix the time approximately, but I could not give the exact date.

Q. Well, let us have the time approximately?

A. Well, that was some time the latter part of February or the middle of February.

Q. Now, let us have the place?

A. Well, I do not know the place—I do not remember the place—it was probably at his residence.

Q. And not on the street as you suggested on direct examination?

A. Well, I had one conversation with him on the streets, but I do not know whether that was mentioned there or at the other place, positively.

Q. The persons present at this conversation?

A. I do not know that there was any one present.

Q. You do not know whether any one was present or not?

A. No, sir; not at this conversation, not until—not except it was the one I explained to you.

Q. Now, the next conversation about which you testified on your direct examination is a conversation which is alleged to have taken place in some office in the Grant block within a couple of months?

A. It has been recently, probably two months—may have been more and may have been less.

Q. That is as near as you can fix the time of that conversation?

A. Yes, sir.

Q. Now, at what place in the Grant block was that?

A. Well, since thinking about it, I think it was in Mr. Ackerman's office.

Q. Well, are you sure of that?

A. Well, I am quite sure of that—sure as I can be.

Q. Can you tell us who was present at that conversation?

A. Well, Mr. Ackerman was present.

252 Q. Now, detail, if you please, that conversation as near as you can remember it?

A. Well, as near as I can remember, I asked Joe how his hands were, and he said they were very bad and I examined them—not very carefully—and I said it looks to me like a very good result, and the trend of his conversation was that he didn't think so and so forth, and he called attention to the condition of his fingers and I recalled to his mind that—about his former statements and so forth—that these had been that way prior to his burn and he said, Oh, no, they were not—Oh, no, they were not—that is about the substance of that conversation.

Q. Well, now, was the substance of that conversation that you were claiming that you had done a skillful job, and he was claiming that you had done a poor job on his hands?

A. May have been something of that sort, but I do not remember

it that way; I do not remember of him ever complaining at all, of my part of it in any conversation.

Q. Will you say that he didn't in that conversation complain of your part of it?

A. I could not positively say that he didn't say—I think I could positively say that he didn't say that I did a bad job or even intimate that.

Q. He didn't complain that his hands were twisted and distorted?

A. He complained that those fingers were crooked; he showed me those. He had never, to my knowledge, in any conversation had any kick coming so far as my part was concerned.

Q. Have you given all that conversation, that took place in Mr. Ackerman's office?

A. I do not know—I have given you the substance of it so far as I can remember it.

Q. Was not the conversation in which you said on direct examination that he told you he had the best lawyer in town?

253 A. I think I did; I think I remember his saying that.

Q. You remember anything being said about the release?

A. No, sir.

Q. Do you remember that you insisted that he could not win his case because of the release?

A. No, sir; I do not remember that.

Q. Well, if any such thing had taken place, you would remember it, would you not, Doctor?

A. I think I would the same as I would if he had inferred that he had had a bad job done.

Q. Well, I do not mean by saying that he had had a bad job done that he was insulting to you or anything of that sort, but I am asking you to tell this jury, if he didn't manifest at that time his dissatisfaction with the condition in which his hands were left?

A. I will say, no, sir, he did not.

Q. And if he didn't tell you that he could not work?

A. I do not remember of his telling me that he could not work.

Q. Do you know whether he did or not?

A. I do not know whether he did or not; my recollection is that he was working at the time.

Q. Didn't he tell you in that conversation that his hands hurt him all the time?

A. No, sir; he didn't complain at all of any pain.

Q. You are sure of that?

A. Yes.

Redirect examination by Mr. CHILDERS:

Q. I will ask you, Doctor, whether the plaintiff ever made any complaint with regard to the treatment that he had at your hands?

254 Mr. FIELD: I object to that as calling for a conclusion. It is for the witness to say what the plaintiff said and the jury to say whether that is a complaint or not.

Mr. CHILDERS: I will withdraw the question.

Q. What, if anything, did the plaintiff at any time ever say to you in the way of the complaint of the treatment he had received?

Mr. FIELD: I make the same objection.

After argument:

Mr. CHILDERS: I will change the question.

Q. What did the plaintiff ever say to you and when about the result of the treatment of his injuries?

A. He never said anything about the results.

Q. What dissatisfaction, if any, did he ever express as to the treatment?

Mr. FIELD: I object as calling for a conclusion.

The COURT: You can ask him whether he ever said anything about the treatment, either one way or the other.

Q. What, if anything, did the plaintiff ever say to you about the treatment either as to being satisfied or dissatisfied with it?

A. He never said anything.

Q. I will ask you if, after this time, whether or not you were ever employed by him as physician and surgeon in his family?

255 Mr. FIELD: I object to it as immaterial and introducing a false issue in the case.

The COURT: I do not think there is anything in the case about mal-practice; I do not know but what the plaintiff claims he had the best possible treatment.

After argument:

The COURT: I will overrule the objection.

Mr. FIELD: Exception.

A. Yes, sir, I prescribed—th——

The COURT: Yes, or No would answer that question.

A. Yes, sir.

Q. What member of his family and what did you do?

A. His daughter.

Q. What was the matter with her?

Mr. FIELD: I make the same objection.

Mr. CHILDERS: I will not insist on that.

Q. I understood you to say, Doctor, that, on the 6th day of January, you administered two doses of morphine of one-eighth of a grain?

A. Yes, sir.

Q. What time of the day were those administered?

A. One in the morning and one in the evening.

256 Q. About what time in the morning was it administered?

A. Well, I judge the time I took him from the brewery, it was early in the morning.

Q. This is the 6th I am asking about.

A. Well, this was the 2nd of January that I administered the morphine.

Q. Did you administer any on the 6th?

A. No, sir; I didn't administer any on the 6th.

Mr. CHILDERS: I was confused about that.

Q. You did not administer any morphine to him on the 6th day of January?

A. No, sir.

Q. And you don't know that anybody else administered any?

A. Not that I know of.

Q. What effect would one-eighth of a grain of morphine have on the defendant (plaintiff) from your knowledge of his idiosyncracies, from your diagnosis of the case, as to rendering him unconscious, and in his then condition?

A. Would not have any effect so far as consciousness was concerned.

Q. State whether or not it would have any other effect, except to quiet the nerves and if so, what effect?

Mr. FIELD: What quantity of morphine?

Q. One-eighth of a grain?

Mr. FIELD: I object to this question because there is no evidence of an eighth of a grain of morphine on the sixth.

Q. Did you leave any instructions as to the quantity of morphine to be administered and if he required any?

A. Just sufficient to quiet him.

Q. I understood you to say that Sister Anthony was perfectly capable of judging of that?

A. Yes, sir.

Q. If he became restless, how much would have been necessary to quiet him?

Mr. FIELD: I object to it as wholly immaterial. I do not think this witness is competent to express an opinion as to how much morphine Sister Anthony might have given this man.

The COURT: He said he administered it on the second.

Mr. FIELD: He said he left the quantity and the number of administrations to the discretion of the nurse.

The COURT: I suppose his mental condition is not particularly in question.

Mr. CHILDERS: It is evidently contended that some was given.

The COURT: I do not see how the amount is material until there is some evidence that some amount was given.

Mr. CHILDERS: I submit it to the court.

The COURT: If it should finally appear that he did have morphine at the time which would affect him on that day, the 6th, the amount would come in question, but I do not remember any such evidence.

Mr. FIELD: The question is as to the admissibility of this evidence at this time in the present state of the record.

The COURT: I will sustain the objection.

Mr. CHILDERS: I will save an exception.

Q. You were asked on cross-examination about the exclusion of visitors from the presence of Mr. Schmitt when he was at the hospital: how long did such a condition continue to require the exclusion of visitors after he was taken there, up to what time?

The COURT: You ask as to the necessity of exclusion?

Mr. CHILDERS: The condition requiring the exclusion.

Mr. FIELD: I object as calling for a conclusion of the witness.

The COURT: I think you would have to connect it with this case. If you expect to introduce evidence that a certain amount of morphine was given and if you expect to introduce evidence that visitors were excluded, and this is only the order of proof why I should exercise my discretion about that, but you make no such suggestion.

Mr. CHILDERS: All I can say about that is: It is based on 259 the opening statement of counsel; he said he expected to prove certain things and I expect he might try to prove them: we might be anticipating, I admit.

Q. I understand you to say that rules of the hospital required that a chart, I think you called it a chart, of any administrations of morphine in any amount to a patient be kept, also a record of the condition of the patient, as to his condition from time to time?

A. I do not know whether they did—as a rule they usually do that.

Recross-examination by Mr. FIELD:

Q. You say you never personally administered morphine but once—on one day?

A. Yes, sir.

Q. And thereafter you left it entirely as to the discretion of the nurse as to when and how much was to be given him?

A. While he was at the hospital, yes, sir.

Q. And whether he was given any morphine on the 6th day of January, 1906, you do not know?

Mr. CHILDERS: I object to that as not proper re-cross examination.

The COURT: I think perhaps it is necessary to make it clear because the witness did testify that he gave him morphine on the 6th.

Mr. FIELD: And it was only at the close of the examination and upon the re-direct that he changed that.

The COURT: I think in order to have this matter cleared up I will allow the question, as that date remained uncertain for a while.

Mr. FIELD: Now, of course, I did not ask this witness 260 certain questions about the application of Mr. Loeb and

Mr. Marron to him because he testified that he administered morphine on the 6th; now I want to ask him this:

Q. What time of the day was it and what day was it that Mr. Marron and Mr. Loeb applied to you to know of Mr. Schmitt's condition?

A. I do not remember the exact date: It was two or three days after he was injured.

Q. You said that at that time you made no special examination in consequence of that application—inquiry, because no examination was necessary, did you not?

A. Yes, sir.

Q. You said that you knew his condition and that he was rational?

A. Yes, sir.

Q. And now you say you do not know whether or not he had morphine administered to him that day?

A. I say that I never administered any except on the 2nd day of January, if I said the 6th, I did it with the idea of 1906, in my mind.

Q. What I would like to have you answer is, if you know now whether or not, on any day, say during the first week that he was in that hospital, morphine was administered to him by the Sisters?

A. I do not know that it was ever administered: I presume it was.

Q. You say that Mr. Schmitt ever employed you in your capacity as a physician for another member of his family, after he ceased to go to your office, do you?

A. I think it was the last visit up that he employed me to prescribe for his little girl.

Q. Well, was it the last visit up: I want you to be accurate about it?

A. That is the best of my knowledge, that it was; to the best of my belief that is when it was.

261 Q. Did you prescribe?

A. Yes, sir.

Q. Did he pay you for it?

A. I do not remember whether he did or not.

Q. Now, don't you remember that you suggested to him to bring down the urine of one of his children and he brought it down, and that is all that ever happened and that it was before the last visit?

A. No, sir; I do not remember that; I remembered that I prescribed for her after I had examined her.

Q. You are positive of that?

A. Yes, sir.

Mr. FIELD: That is all.

Mr. CHILDERS: That is all at this time.

O. N. MARRON, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name?

A. O. N. Marron.

Q. What is your business?

A. Attorney at law.

Q. What connection have you with the Southwestern Brewery & Ice Company?

A. I am a stockholder and director.

Q. Are you generally employed as attorney for them when they have any business?

A. Yes, sir.

Q. Did you know Jacob Loeb in his life time?

A. Yes, sir.

Q. What position did he hold in connection with the brewery company?

A. He was president of the Southwestern Brewery & Ice Company.

262 Q. Is he living or dead?

A. He is now dead.

Q. When did he die?

A. He died in October about a month ago.

Q. I will ask you if you went with Mr. Loebs to visit the plaintiff at any time after he received the injuries for which this suit was brought?

A. Jacob Loebs?

Q. Yes.

A. Yes, sir.

Q. Do you remember what day you went?

A. I can fix the date by the date of the release.

Q. Look at that and fix it.

A. (Witness examines paper.) It was on the 6th of January, 1906.

Q. Had you made any inquiries before visiting him as to his condition?

Mr. FIELD: Objected to as wholly immaterial and incompetent. It is *res inter alios actæ*.

After argument:

The COURT: I will overrule the objection to this question, but I do not think I should allow you to state the result of his inquiries.

Mr. FIELD: Exception.

Q. To whom did you make that application?

Mr. FIELD: Same objection. It is wholly immaterial and *res inter alios actæ*.

263 A. I did make inquiries——

Q. Of whom did you make the inquiry?

Mr. FIELD: Objected to on the same ground.

Objection sustained.

Mr. CHILDERS: Exception.

Q. What reply did you get from the persons of whom you make the inquiry?

Mr. FIELD: Same objection.

The COURT: Sustained.

Mr. CHILDERS: Exception.

Q. Did you go or not with Mr. Loebs to visit the plaintiff on the 6th day of January, 1906?

A. I did on the afternoon of the 6th day of January—Mr. Loebs and myself went to St. Joseph's Hospital and had an interview with the plaintiff, Mr. Schmitt.

Q. About what time in the afternoon did you go?

A. To the best of my recollection, it was about 4 o'clock—between three and four o'clock.

Q. Whom did you see when you went there?



A. When we went there one of the Sisters was in the room.

Q. Do you remember what Sister that was?

A. Well, I would know her if I saw her, but I do not know her name.

264 Q. When you had that conversation—did you have any conversation with the plaintiff?

A. Yes, sir; we had. Mr. Loebs and myself had a conversation with the plaintiff and there was no one present except Mr. Schmitt, Mr. Loebs and myself at the time that we had the conversation.

Q. How long were you there?

A. Oh, we were there upwards of an hour, it would be more than an hour.

Q. Did the sister remain in the room or retire?

A. No, the sister did not remain in the room; she retired.

Q. You had a written release already prepared, or not?

A. I had, yes sir.

Q. State whether or not that was read over to him?

Mr. FIELD: I object, let him state what was done.

Q. Go on and state everything that was done while you were there? everything that was said and who said it?

A. We sat at the bedside of the plaintiff and Mr. Loebs conversed with him relative to his condition. It was the first time that Mr. Loebs had seen him from the time of the accident and it was the first time that I saw him, and Mr. Loebs explained to the plaintiff that the brewery company, the Southwestern Brewery & Ice Company, was willing to pay the expense of his sickness, and his hospital expenses and continue him on the pay roll of the brewery during the time of his sickness, and in consideration of that, he asked Mr. Schmitt if he would release the brewery company from any claim of damages that he might have, not admitting that the brewery company was liable for any damages, because of the accident, and Mr. Schmitt stated to Mr. Loebs that he and Mr. Loebs had been friends for a

265 number of years, that he had been employed by the brewery company for a number of years and that they had gotten along very well together, and that he would be perfectly willing if the brewery company would do as suggested by Mr. Loebs, to release the company from all claims for damages, and Mr. Loebs stated to him that he had me prepare a release in conformity with the suggestion made by Mr. Loebs to him, and I had the release with me and Mr. Loebs asked me for it, and I took it out of my pocket and handed it to Mr. Loebs, and Mr. Loebs took the release, and he read it to him in German, suggesting to Mr. Schmitt at the time that possibly he might understand it better if he read it in German, and he read it sentence by sentence and explained it to him. After he had finished reading it in German, Mr. Loebs handed it to me and asked me to read it to Mr. Schmitt in English and explain it to him fully, and I read it to him in English and explained the full purport of it, and I asked Mr. Schmitt if he fully understood what was in it, and he told me that he did, and he reiterated what he said to Mr. Loebs, that he didn't want any trouble with the brewery company and that the

proposition as made that all of his expenses be paid and that he be carried on the pay roll, so that his family would be cared for, was perfectly satisfactory to him, and something in addition to that—something in addition was said by Mr. Loeb as to Mr. Schmitt being re-employed and for all time, so long as Mr. Loeb had anything to do with the brewery, that Mr. Schmitt would have a job there. And Mr. Schmitt stated that he had—stated that he fully understood the situation, and then I took a pen and ink and wrote Mr. Schmitt's name and put the pen over to him—he was in bed, and he touched the pen and I made his mark there. I asked if that was satisfactory to him and he expressed his satisfaction with it.

266 Q. You say nobody was present when this was done?

A. No, except Mr. Schmitt, Loeb and myself. And after that was done, then there was a general conversation and Mr. Schmitt told Mr. Loeb that he had missed his beer more than anything else; that he had not had a drink of beer since he had been in the hospital and that he missed it very much and he asked Mr. Loeb if he would not send him up some beer. Mr. Loeb told him that there was not anything but that he could have, that the brewery company could get for him. He said, however, that before he would send the beer up, he could consult his doctor and see if it was satisfactory to the doctor to permit him to have some beer.

Q. State whether or not you have attempted to give the conversation or the substance of what took place there?

A. Oh, I do not pretend to give the exact conversation; I am merely giving the substance of what transpired during the time that we were there.

Q. Now, if there is anything else that took place while you were there, you can state it?

A. I do not remember of anything else that transpired at that time.

Q. Have you the release there that was executed at that time?

A. I have.

Mr. CHILDERS: I offer the release in evidence.

Mr. FIELD: I would like to examine it. I would prefer to state the ground of objection after I examine the witness as to the execution of it.

Mr. CHILDERS: We are entitled to the admission of the release at this time.

267 The COURT: I will admit it now and if the reasons are sufficient, I will strike it out.

Mr. FIELD: I do not think it ought to be admitted now.

The COURT: I will suspend the ruling on that until the cross-examination of the witness.

Mr. CHILDERS: I except to the refusal of the Court to admit it at this time.

Cross-examined by Mr. FIELD:

Q. Have you had possession of this paper ever since the 6th day of January?

Mr. CHILDERS: I am not through with my examination.

Mr. FIELD: I do not care to cross-examine until you are through with him.

Direct examination by Mr. CHILDERS continued:

Q. Have you had any conversation with the plaintiff since the 6th day of January, 1906, with reference to this cause of action, this suit; if so, how many such conversations have you had?

A. I recollect two, some time after.

Q. You may state them in the way in which they came and give the time and place when you had them?

Mr. FIELD: And the persons present, if anybody.

A. Some time after his recovery, I cannot remember just exactly when it was, but it was prior I think to the filing of the affidavit as the basis of the suit—but as to that, I would not be absolutely certain, but it was about that time, he came to my office and I had a conversation relative to his claim against the brewery company.

Q. It has been suggested that you state who was present, if you remember, at that conversation.

A. Well, the best of my recollection is that there was present Mr. Schmitt, my stenographer and myself, at the first conversation.

Q. Who was your stenographer?

A. Miss O'Neill.

Q. Did she hear the conversation?

A. That I do not know, whether she did or not.

Q. You simply remember that she was in the office?

A. That is the best of my recollection.

Q. Fix the date of it as near as you can?

A. It was some time—it was either just before or just after that affidavit was filed. I would not be certain, but I think it was before, and he stated to me that he wanted the brewery company to pay him something for the accident, and I asked him what his ideas were in regard to that, and he told me that he wanted the brewery company to pay him enough so that he could get a house, purchase a home.

Mr. FIELD: I ask that that conversation be taken from the jury as a proposition to compromise is not proper evidence and if it was anything, it was a proposition to compromise this claim.

Mr. CHILDERS: I do not think it was a proposition to compromise.

It is rather an admission.

269 Mr. MARRON: It is not in the way of a compromise.

Mr. FIELD: I think the law pronounces it to be a proposition to compromise.

The COURT: For what purpose do you offer this conversation, Mr. Childers?

Mr. CHILDERS: That is only part of the conversation that the objection is interposed to. There is more of it to follow. It will develop what it was over when we get the balance of the conversation.

After argument:

The COURT: That may be stricken out.

Mr. CHILDERS: I will save an exception.

The COURT: The jury are not to consider what was said by the witness as the evidence looking towards a compromise between the parties of a claim which is set up is not admissible.

Mr. CHILDERS: Defendant excepts to the action of the court in striking out the testimony on the ground that it is not an offer to compromise or settle the claim, but is in the nature of an admission by the plaintiff.

Q. Omitting any matter in regard to what he wanted, state whether you had any other conversation with him there and what that conversation was?

270 A. Well, we discussed at that time the accident, how it occurred and so forth.

Q. That is what I want you to give?

A. I asked him the question if he was cognizant of the condition of the cooker all the time for several months before the accident happened, and he told me that he was, just as conversant with the condition of it as anybody was, and in that connection I told him, that in view of that, that the brewery was not liable—that the company was not liable.

Mr. FIELD: I object to the opinion of Mr. Marron expressed to the plaintiff.

A. That is what I told him.

Mr. CHILDERS: It is a part of the conversation.

After argument:

The COURT: Objection overruled.

Mr. FIELD: I except to the action of the court in refusing to strike that out.

Q. You can proceed?

A. I went into that matter fully with him and explained why the brewery was not liable.

Mr. FIELD: I object to this: I want him to tell what was said.

Q. Give the conversation as near as you can recollect it?

271 A. As I stated before in answer to my question, whether or not he knew of the condition of the boiler and how long he knew of the condition of the boiler, or of the cooker, and that he was cognizant of the condition all the time and on the day of the accident—and he admitted that—he stated to me that he knew about it. I told him that the brewery company was not liable, and he never made a suggestion to me—

Mr. FIELD: I object.

The COURT: Not what he didn't do.

Q. What else did he say?

Mr. FIELD: Of course, I want it understood that I object to this in the record. It is a mere repetition of the same thing.

The COURT: Yes.

Q. What else did he say, if anything?

A. Well, my recollection is—even if the brewery was not liable yet they ought to pay him something.

Q. Is that all that conversation?

A. Well, I told him that we had taken care of him and carried him on the pay roll, and everything of that kind.

Q. Was that practically all of that conversation?

Mr. FIELD: I move to strike it all out on the ground that it appears from the testimony of the witness that it is part of an attempted negotiation for compromise.

272 The COURT: So far as his testimony related to the statement of the plaintiff that he knew the conditions up there, it does not add anything to what he has testified here, I suppose.

Mr. CHILDERS: What who testified?

The COURT: The plaintiff.

Mr. CHILDERS: I do not think that is any reason for excluding it; I do not know any rule that prevents us from proving it.

The COURT: I cannot recollect any part of this conversation that seems to be admissible now, and I will sustain the motion to strike it out.

Mr. CHILDERS: I will except. I will save an exception.

Q. You stated that you had another conversation with the plaintiff, about when did that conversation take place?

A. Some time—some little time before the suit was filed. I could not state exactly.

Q. The suit was filed on the 18th of August, 1906, at what time would that make it then?

A. It might have been in June or July, but I cannot recollect just exactly when it was: It might have been before that.

Q. Where did that conversation take place?

A. In my office.

Q. Who was present at that time?

A. Mr. Schmitt, Mr. —, his brother-in-law, With, I think it was—With and myself.

Q. State that conversation?

273 A. It was practically along the same line as the first conversation.

Q. Did you talk of a settlement in that conversation—offer to settle?

A. Yes.

Q. Anything else, except that?

A. Yes, Mr. Schmitt wanted a copy of the release.

Q. Did you have any conversation about the release with him?

A. Yes, he said that he wanted to see the release or a copy of it.

Q. Did you show him the release?

A. No, I didn't.

Q. What if anything did he say about the release or the execution of it in that conversation?

A. My recollection is that he said he had forgotten the terms of

the release. That is my recollection. I would not be certain as to that.

Q. Any other conversation about that, except that?

A. That in effect is about all that was said, and I refused to let him see the release or give him a copy of it.

Q. That was all then in that conversation?

A. Yes, sir; that was all.

Q. Now, why didn't Mr. Schmitt sign that release himself, with his own hand?

Mr. FIELD: That is an inference which the jury is as capable of drawing as the witness himself.

Q. Why didn't you have him to do it?

Mr. FIELD: I make the same objection.

The COURT: I think when he explains his condition and  
274 tells what was said—there might have been something said between him and Schmitt.

Q. What, if anything, was said about him signing the release with his own hand?

A. His hands were all covered up with cotton bandages, both of his hands and something was said, of course, about his inability to do it and that his touching the pen would be the same thing and that he could not do it because of his hands being swathed in cotton.

Q. They were so swathed?

A. Yes, sir; both were swathed in cotton.

Q. Could he or not hold the pen?

A. He could not hold the pen.

Q. Now, I will ask you what Mr. Schmitt's apparent mental condition was as to being rational and conscious at the time during the hour that you were there on this occasion?

A. Well, during the time that we were there and during all that conversation and at the time that he executed that, he appeared to be just as rational as he did here on this stand—talked—never was any suggestion of his not being rational. There was no indication, either from his actions, or from his conversations, that he was anything else, but rational.

Q. Of course, he was conscious if he was talking?—

versations with Mr. Loeb there; carried on conversations with Mr. Loeb and myself in English and carried on conversations with Mr. Loeb in German.

Q. Do you think of anything else to state?

A. No, I do not.

Cross-examination by Mr. FIELD:

Q. Do you understand German?

A. Well, I do not understand German, but I know when German is being spoken.

275 Q. Well, you don't know whether Mr. Loeb's was reading to Mr. Schmitt this paper (referring to release) in German or reading the Lord's prayer in German, do you, if you do not understand German?

A. I know that Mr. Loeb's was reading that paper to Mr. Schmitt.

Q. And notwithstanding the fact that you do not understand the German language you are ready to swear that Mr. Loeb's translated this paper into German?

A. He had the paper in his hands, Mr. Field, and he was reading from the paper, sentence by sentence, and that indicated to me, of course, that he was reading that paper to Mr. Schmitt instead of reading the Lord's prayer.

Q. And you are willing to swear that he was not reading the Lord's prayer to Mr. Schmitt at the time that he appeared to be reading this paper?

A. Well, I feel as certain of that as I am certain of anything human.

Q. You are as certain of that as you are of anything you testified about here?

A. I am absolutely certain of what I am testifying to and have testified to.

Q. Well, I want to know now, if you are willing to swear that Mr. Loeb's was not at the time that you thought he was reading this paper in German to Mr. Schmitt repeating the Lord's prayer?

A. I cannot state further than what I have stated, namely, that Mr. Loeb's had that paper in his hand, sitting at the bed side of Mr. Schmitt, and was reading from that paper to Mr. Schmitt and speaking in the German language.

Q. This paper is not in the German language, is it?

A. It is not; it is in the English language.

Q. Then he must have been engaged, if he was undertaking to explain this paper to Mr. Schmitt, in making a translation from the English into the German?

276 A. Naturally, that would follow as night the day.

Q. And you not knowing a word of the German language are you willing to swear that he made such a translation?

A. It is not absolutely necessary for me to know the German language in order to know that, in my opinion.

Q. Just answer my question, please?

A. What is your question?

Q. (Repeated.)

A. I am willing to testify and to swear that from the actions of Mr. Loeb's and from what transpired and occurred at that particular moment, Mr. Loeb's with the paper in his hand and speaking in German and reading from the paper, and speaking to Mr. Schmitt, that he was translating that from the English into the German for Mr. Schmitt's benefit.

Q. How long have you been a lawyer, Mr. Marron?

A. I was admitted to the bar in May, 1891.

Q. Appended to this paper appear to be the names of Alice Garcia

and Mrs. J. W. Prestel: Were they in the room at any time before Joseph Schmitt's name was signed to this paper by you?

A. They were not, Mr. Field. After the——

Q. The sister left the room as soon as you came?

A. That is my recollection, Mr. Field.

Q. Did she go out at your request?

A. Well, that I do not remember, but I think possibly we did request her to leave the room, but as to being positive—I would not be positive as to that. Naturally I would request her to leave the room and that is the reason why I say I think possibly I did request her to leave the room.

Q. Do you know the wife of this plaintiff?

A. The first time I ever saw her and knew she was his wife, was on the stand here the other day.

Q. Do you know his sister?

277 A. Well, that is the first time I ever knew she was his sister. I have seen those ladies on the street, but did not know who they were.

Q. How many visits to Mr. Schmitt did you and Mr. Jake Loeb make together?

A. Just that one.

Q. Did you see those two ladies come out of Mr. Schmitt's room as you went in?

A. I did not, Mr. Field.

Q. Can you state whether or not they were there?

A. I cannot say whether they were there because I did not see them.

Q. Well, they might have been there and yet you not see them?

A. There in the room?

Q. I do not mean in the room; I mean in the corridor, by the room, just having come out as you were going in?

A. It is possible that they were there, but I did not see them; They might have been there, of course. I did not notice who was there.

Q. You do not remember whether or not you saw two ladies right there in that corridor when you were going into the room.

A. I do not, Mr. Field.

Q. Now in detailing what took place there in the room, you used this expression—I do not know whether you meant to attribute it to Mr. Jake Loeb or not, as something Mr. Jake Loeb said to Mr. Schmitt—not admitting that the brewery company was liable: do I understand you that Mr. Loeb said that to Mr. Schmitt?

A. My recollection is that both of us stated that to Mr. Schmitt.

Q. You went to this man's room on the 4th day after this accident at about three o'clock, between three and four o'clock in the afternoon, with this release already prepared?

A. Yes, sir, Mr. Field.

278 Q. You know that this man had a wife and children?

A. That I did not know. I did not know whether he had a wife or whether he did not have a wife.

Q. You didn't make any inquiry to find out?



Mr. CHILDERS: I object to that as immaterial and not proper cross-examination.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. No, I didn't make any effort.

Q. You knew he had a sister and brother-in-law?

Mr. CHILDERS: Objected to for the same reason.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. That I did not know, either.

Q. And you made no effort to find out?

A. No, sir, I did not.

Q. Do you know whether Jake Loeb knew that this man had a wife and children and a sister and brother-in-law?

A. No, I have no knowledge as to that; whether he knew or not.

Q. When did you first learn that he did have a wife and children and a sister?

A. That, I could not say.

279 Q. You certainly made no inquiry as to whether this man had any relatives?

A. I do not remember having made any inquiry, Mr. Field.

Q. You offered him no opportunity to obtain independent advice on the subject of the execution of this paper?

A. Why he didn't ask for an opportunity for independent advice; if he had done so, why, we certainly would have granted it to him: On the contrary he stated that—

Q. You didn't suggest to him the desirability of his taking independent advice, did you, Mr. Marron?

A. No, I did not suggest it to him.

Q. Was it or not your idea at the time this paper was executed by the plaintiff in this case, that if he died that night, the brewery company's liability would cease when it paid his funeral expenses and the expenses which had been incurred at the hospital, up to that time?

Mr. CHILDERS: I object to that as immaterial; I do not think that is a proper question and it is not proper cross-examination.

A. I do not object to answering it.

Mr. CHILDERS: Why should we have that in the case when it does not properly belong there.

Mr. FIELD: I think it does.

The COURT: I do not see how it has any bearing, except perhaps as to the credibility of the witness as to the facts on this  
280 occasion, would seem to be in serious dispute. Overruled.

Mr. CHILDERS: Exception.

A. There was no such contingency presented and I never gave it a thought, Mr. Field. From his condition as we found it there in the hospital, the question of his dying or anything serious in the matter except the pains, never presented itself to me.

Q. You went there in your capacity as attorney for the brewery company, did you not?

A. I did.

Q. I ask if you do not know, as a lawyer, that if this man had died that night as a result of those injuries, that that release if valid, would cut off the rights of his wife and children?

Mr. CHILDERS: I certainly object to that. It is asking for his opinion as an attorney. It is a question of law, pure and simple, and absolutely incompetent.

The COURT: Sustained.

Mr. FIELD: I offer to show by the witness that he does know that, and except to the refusal of the court to permit me to show it.

Q. You say that Mr. Schmitt came to your office at some time in the month of June or July and asked you for a copy of this release?

A. I would not be certain as to the time, Mr. Field, but as to the fact that he did ask me for a copy of the release, of that I am certain—I do not know—you might be able to refresh my  
281 recollection in regard to it, but I cannot say positively as regard to the time. It may have been later than that—I do not know.

Q. Is it not to the best of your recollection a fact, Mr. Marron, that when he came to you for a copy of this release, he stated to you that he had come at my instance; that he had just heard that it was claimed that he had executed a release to the brewery company and that he would like to have a copy of it to show to me?

A. My best recollection, Mr. Field, is that your name was not used. My recollection is that he said something about his lawyer, but now as to that I would not be absolutely certain, but that is my best recollection, but so far as saying that this was the first time that he knew about a release having been executed, I do not remember of his having said anything of that kind. My best recollection is that he didn't remember the terms of the release, not as to the fact—not as to the release never having been executed, but as to what were the provisions of the release.

Q. You knew from the time that paper was served—that affidavit was served, that I was his lawyer, didn't you?

A. Well, that I do not know—I think probably I did, yes.

Q. You are quite quite familiar with papers that come from my office and know my stenographer and notary, do you not?

A. Why, I was not at that time very familiar, no.

Q. Was I not constantly serving papers on you in other matters, Mr. Marron, at that time?

A. Yes, sir; I think you were, and I think probably I knew you were his lawyer.

Q. Don't you know that you knew it and that you talked with me about the case just after the affidavit was served?

A. Just after the affidavit was served?

Q. Yes?

A. Would you call my attention to the occasion?

282 Q. I do not know that I could call your attention to the occasion properly——

A. I know we had several conversations relative to it, but as to any conversation immediately after the filing of that affidavit, or service of that affidavit I would not be certain; it is possible we may have had a conversation.

Q. I do not mean by immediately, in a few days, it may have been a few weeks?

A. I will tell you, Mr. Field, that fact is that in some way or other I got the impression that Mr. Heacock at that time was advising Mr. Schmitt. I do not know how I got that impression, but that was my impression as I recollect it.

Q. Now, I want to ask you, Mr. Marron, if at the time that Mr. Schmitt applied to you to show him this release and give him a copy of it, whether he told you or not that he wanted it for me, or whether he merely stated he wanted it for his lawyer, and if you didn't know at that time I was his lawyer?

Mr. CHILDERS: I do not see how that is material.

The COURT: Overruled.

A. I do not object to answering your question. It is barely possible that I did know.

Q. Then why did you refuse to give Mr. Schmitt a copy of that release?

A. I had no reason, Mr. Field, really.

Redirect examination by Mr. CHILDERS:

Q. Was there more than one release executed by the plaintiff to the defendant?

A. No, just the one.

283 Q. You were asked on cross examination why you didn't give the plaintiff any advise as to consulting with anybody before executing that release; I believe you started to make some reply to that and it was cut off. What was it that you were going to say?

Mr. FIELD: I do not care anything about his reasons; I wanted the facts.

Q. What did you intend to say?

A. I did not catch your question, Mr. Childers; what was that question?

The COURT: Mr. Childers suggests that you were cut off in answering some question that was asked you by Mr. Field.

Q. With reference to advising the plaintiff to consult with somebody.

Mr. FIELD: I objected to his telling why; it is the fact I wanted, not the reason; I object to it.

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. Well, he appeared to be perfectly competent to look after his

own interests and from what he said to Mr. Loeb of his friendship for the Loeb and the brewery and the way in which the brewery had formerly treated him and how he expected to continue in the employ of the brewery, the idea of his needing anybody to advise with never suggested itself to me.

284 Mr. FIELD: I ask to strike that out as not responsive, as incompetent and immaterial.

The COURT: Overruled.

Mr. FIELD: Exception.

Mr. CHILDERS: I ask the court to admit the release in evidence.

Mr. FIELD: I have no valid objection to the release at this time.

The COURT: It is admitted.

Paper marked Defendant's exhibit 3.

Recross-examination by Mr. FIELD:

Q. I understand you to say that you didn't offer the plaintiff any opportunity to obtain independent counsel because you thought he was perfectly competent to take care of his own affairs?

A. The fact that he was apparently in that condition was the reason that it never suggested itself to me that—he wanted an opportunity for independent advice. It never suggested itself to me at all.

Q. You know, of course, that in his normal condition, he was perfectly competent to determine the liability of this defendant company to him for this accident?

Mr. CHILDERS: I object to that as immaterial.

The COURT: Overruled.

285 Mr. CHILDERS: Exception.

A. Well, that I do not know whether he would be competent or not.

Q. Didn't you have any reason to believe and don't you have any reason to believe that, in his normal condition, if he had not been hurt at all, that he would have no conception of the legal questions which were involved in determining the liability of the brewery company to him?

Mr. CHILDERS: I object to it on the grounds that it is wholly immaterial, irrelevant and incompetent.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. Although he might have felt that the company was liable to him, yet he might be perfectly willing to release the company from liability, and the fact that he appeared to be in a condition to contract and was all right, and never suggested that he wanted to see anybody and consult anybody, it did not occur to me, of course, to suggest to him that he ought to consult somebody before he signed it.

Q. And that, notwithstanding the fact, that you knew to a moral certainty that he was not capable in his normal condition of deciding the legal questions involved—in determining the liability of the company?

Mr. CHILDERS: I object to it as immaterial, irrelevant and incompetent.

286 The COURT: Overruled.

Mr. CHILDERS: Exception.

A. I did not know that to a moral certainty; he might know and probably did know and have an idea as to what his rights in different cases were and as to his rights as an employé and as to the duty of the employer—that is generally speaking, and I could not say now to a moral certainty that Mr. Schmitt didn't have that knowledge.

Q. You supposed on that day that he did have and for that reason you did not suggest to him that he should get it?

Mr. CHILDERS: I object to that.

A. No, that was not the reason.

Q. You supposed on that day that Mr. Schmitt did have such knowledge as to his rights?

A. Well, to tell you the truth, I never gave that a thought. The pre-nuptial was that he knew what his rights were.

Q. You thought the brewery company needed a lawyer on that occasion, didn't you?

A. No, Mr. Loeb's did; Mr. Loeb's came to me and asked me to go.

Q. It never occurred to either you or Mr. Loeb's that the plaintiff might need a lawyer?

A. I do not know what occurred to Mr. Loeb's, but it did not occur to me, Mr. Field.

Q. And if it did occur to Mr. Loeb's, he didn't mention it?

A. That was not mentioned by Mr. Loeb's in the conversation.

Q. Did he mention it to you?

287 A. No, he didn't mention it to me.

Mr. FIELD: That is all.

HENRY LOEB'S, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name?

A. Henry Loeb's.

Q. Are you connected with the defendant company?

A. Yes, sir.

Q. In what capacity?

A. I am Secretary and Treasurer.

Q. What position did you hold with the company in January, 1906?

A. I was foreman, I believe.

Q. What were your duties as foreman?

A. Why, I see that everything is all right and the employé's work.

Q. Have you weighed these two balls and this wheel, I show you? (Exhibiting plaintiff's exhibits 1, 2 and 3.)

A. Yes, sir.

Q. How much does this large ball, marked No. 1, weigh?

A. Five pounds.

Q. How much does this smaller ball weigh?

A. Two pounds and eleven ounces.

Q. How much does the wheel weigh?

A. Thirteen ounces.

Q. What was the length of the lever or whatever it was upon which were—it is a lever, is it not?

A. Yes, sir.

Q. What was the weight of that—did you measure that?

288 A. From end to end it is ten inches, to where it rests—that is an inch off.

Mr. FIELD: I did not quite understand that.

Q. What do you mean by where it rests? You mean where it goes into the safety valve, like that (indicating), or what do you mean?

A. The stem what leads that lever.

Q. Well, now how does that—you say the stem—take that pencil for a lever and take something here to represent the safety and show how that is fixed?

Mr. FIELD: He can take one of those balls.

A. (Demonstrating.) For instance, this is the lever here, it has a little claw that catches this—the little claw catches the end here—catches it to the safety valve—then the stem it comes up from the safety that catches here about, and raises this stem down.

Q. That is about an inch in here?

A. That is about an inch from here to here.

Q. And these balls are fastened out there, are they?

A. Yes, sir.

Q. How?

A. They are not fastened at all, we can slip them——

Q. Slip up and down the lever—slide?

A. Yes, sir.

Q. It has been testified here by the plaintiff that he went to work for the brewery in the month of April, 1905, is that about the date?

A. Yes, sir; it was in the spring of 1905.

Q. That is when he commenced to brew?

A. No.

Q. When he commenced to brew the brewing with the cooker?

289 A. I start him in about two months afterwards, to brew

Q. Between the middle of April—two months after that—what do you mean?

A. In making beer.

Q. You call making beer, cooking this mash in the cooker and discharging it in the mash kettle—or tub?

A. Yes, sir.

Q. You didn't turn him loose to do that by himself until about two months afterwards?

A. Yes.

Q. Were you there every time he brewed then for two months from that time, the middle of April?

A. I was there a couple of times, when he started in to brew.

Q. Then who was there—you brewed more than twice in two months, didn't you?

A. I was with him telling him all the connections and how to make the mash.

Q. Did he make it after you had been with him twice, alone?

A. I cannot tell exactly how many times I was with him, but I was with him till I was sure that he knows everything.

Q. And when you ceased to be there then you were sure that he knew everything about it?

A. Yes, sir.

Q. After that time, did he call upon you or not for any further information?

Mr. FIELD: I object to his leading this witness.

Q. Did he or not call upon you for any further information or instructions?

The COURT: He can answer it.

290 Mr. FIELD: I except.

Q. As to how to manage this cooker?

A. He came once in a while and asked me some questions.

Q. With reference to what did he ask you questions—what questions did he ask you?

A. Oh, different ones, whatever it was necessary.

Q. Well, state whether or not he asked you with reference to how to arrange those valves and control—

Mr. FIELD: I object to that as grossly leading and suggestive.

Q. Go on and state to the jury what he asked you about?

A. Well, some time whether the malt is grind too fine or how to get hops or some other material what we are using.

Q. That is with reference to the malt and stuff and grits, that he put in there?

A. Yes.

Q. What I am asking you about is with reference to the management to these valves and about the steam and things of that kind?

Mr. FIELD: That is what I object to.

Q. Go on and state what he asked you, everything that he asked you?

A. Well, whatever comes up in the brewery—in the brew house—I cannot mention it all. Whenever I went through we always had a little talk together about things.

Q. What particular things were these that he asked you about?

291 The COURT: Besides what you have stated?

A. Why generally about the boiling point—whenever we commence boiling and how to boil—that is one of the main things in the brewery.

Q. State whether or not he ever said anything to you about the condition of the cooker?

Mr. FIELD: I object to that as leading and suggestive.

The COURT: Overruled.

Mr. FIELD: Exception.

The COURT: You understand the question?

A. Yes, sir—in on the start—when he started in?

Q. Afterwards, state what, if anything, he ever said to you about the condition of the cooker. When he first mentioned it?

Mr. FIELD: Same objection.

Mr. CHILDERS: Question withdrawn.

A. Why, I think it was—

Q. What, if anything, did he ever say to you about—when did he first say anything to you after the start—after he started about the condition of the cooker?

A. I think that is about the end of November, middle of November or end of November.

Q. What did he say?

292 A. Why, one day he said to me, there is a little leak on that cooker.

Q. That was in November, 1905?

A. Yes.

Q. There was a little leak on that cooker?

A. Yes, sir; I would ask him where, he says, come on and I will show—he took his saw—keyhole saw—cut the floor out and we looked under it—there was one drop of mash from the brewing before.

Q. One drop of mash was where?

A. Hanging on the bottom.

Q. What else did you find there?

A. That is all.

Q. What did he say about it?

A. He says, we ought to get it fixed.

Q. What did you say?

A. I said, yes.

Q. Is that all you said then?

A. Yes.

Q. State what was done?

A. I say to him I guess we go down in the foundry and get a man up and get that cooker examined—so when my brother came around I explained it to him.

Mr. FIELD: Was Mr. Schmitt there?

A. No, not when I spoke to my brother.

Mr. FIELD: Never mind that then.

Q. State if you know what was done of your own knowledge?

A. Why, he went down in the foundry and I think it was the next day—

Q. You went down in the foundry?

A. No, my brother.



Q. Well, go ahead?

293 A. The next day Mr. Ridley came up. We went in together—measured it.

Q. What do you mean when you say, we?

A. Mr. Ridley and myself, and took the measurements.

Q. Was Mr. Schmitt there when it was taken?

A. Didn't see him; he was not in the cooker.

Q. State what examination, if any, was made while Ridley was there?

A. Why, Ridley said that the cooker needed a new bottom.

Q. What else did he say?

A. Then I went asking him whether that cooker would not hold till we get a new bottom in.

A. He said, yes—can use a couple of times yet, and so we did.

Q. That is a couple of times before the accident; how many times did you use it after that, between that time and the accident?

A. I guess three or four times; brewed only once a week.

Q. What time was it when you made this examination, as near as you can fix it, what was the date?

A. I think it was in the afternoon.

Q. You heard the testimony here of the witness the other day, Mr. Ray, giving dates from his books as to when the material was ordered, was that about the time or not?

A. Yes, sir.

MR. FIELD: I certainly object to that.

THE COURT: I think that is leading.

Q. What time was it with reference to the date, Mr. Ray gave here the other day?

294 MR. FIELD: The witness has already fixed the time as about the middle of November; Mr. Ray testified that it was the 4th of December.

THE COURT: He went right on with his narrative as if this took place immediately, the next day. He says his brother went to the foundry and the next day Ridley came up.

MR. CHILDERS: I do not think the witness meant that.

THE COURT: He didn't fix it very definitely—he said along in November.

MR. FIELD: All I want is that the witness shall fix it according to his own memory and not at the suggestion of counsel.

MR. CHILDERS: It is apparent the witness does not express himself as well as he might.

THE COURT: I will sustain the objection.

MR. CHILDERS: Exception.

The hour of 5:30 having arrived, the trial of this case is adjourned until tomorrow morning at 9:30 a. m.

And now, on this November 12th, 1907, at 9:30 a. m., the trial of this cause proceeds pursuant to adjournment.

Mr. HENRY LOEBS resumes the witness stand.

Direct examination continued by Mr. CHILDERS:

Q. Which one of these weights did you use when you were operating the cooker?

A. The big one.

Q. I will ask you to explain to the jury why it was necessary—what you meant by raising the safety?

A. I meant by raising the safety in case there is too much pressure on so it blows off.

Q. What does raising it have to do with it?

A. The pressure.

Q. Explain that?

A. Why, you raise it so in case the safety is stuck and be sure after you get pressure on so it works.

Q. In other words you mean to try it?

A. Yes, sir; try it.

Q. Now, you say that the first time, as I understood you, that Schmitt ever said anything to you about the condition of the cooker, was after you put him in charge of it—was about the middle of November, 1905?

A. Yes, sir; it was about that time.

Q. Now, go on and state all that he said then and all that he did; all that took place between you and him about the cooker that first time, about the middle of November, 1905?

The COURT: Didn't he state that yesterday?

Mr. FIELD: I think he did.

The COURT: I thought he stated it fully.

Mr. CHILDERS: He did not state all of it.

The COURT: Instead of having him go all over it—he stated a great deal about it—he told about the plaintiff cutting out the woodwork and the appearance of the bottom when it was uncovered, and about having Ridley come there and examine and measure it.

Mr. CHILDERS: He didn't state anything about putting that patch on.

The COURT: I do not remember that he did.

Q. On this occasion when he talked to you about the cooker, what, if anything, did Schmitt do?

A. Why, there was nothing done the same time until about a week or so—about a week afterward—he went to work and took a drill—bored a hole through and took a bolt and two washers and bolted it up again.

Q. Did he repair it more than once or not?

A. He repaired it later on again, about 10 or 12 days later.

Q. Now, when he did this, put this bolt and the washers on there, state whether or not you told him to do it or he did it of his own accord; whether he did it himself?

A. I did not know anything about it until it was done; then he came down the steps and I passed outside the door and he spoke

to me and he says, now Henry, that is good for another year; and I asked him what is good for another year; he said the cooker; then I was asking him what he done with it; he said he put a bolt in it; that was all.

Q. What did you do; did you go to see it?

A. Not the same time; I went up later on.

Q. Well, what took place, if anything; did it leak at that place or not?

A. It didn't leak.

297 Q. Now, go on and tell about the second time he made repairs; now tell about the second time he put the other patch on?

A. The other patch, he put that on and told me he was going to put it on, and I thought if the first one didn't leak, I guess he can fix the other one that won't leak, but he went to work and took the first one out—took a half inch piece of iron—if I ain't mistaken, it was about four inches long—bored holes through—took two bolts and bolted it together.

Q. Did it leak after this?

A. No, sir.

Q. What did he say—I understand you to say that was about 12 days after he put on the first one?

A. Yes, sir.

Q. What conversation did you and he have about that cooker at that time?

A. Why, there was nothing said about it.

Q. What, if anything, was said about a new bottom?

A. There was nothing said after the second patch.

Q. When was there anything said after the second patch about the cooker between you and Schmitt?

A. If I ain't mistaken when the iron came in—I told him the iron is in for the cooker, and that is all.

Q. Now, I understood you to say yesterday afternoon that you went with Ridley to take the measurement when you made the examination and took the measurements?

A. I did.

Q. Did I understand you to say that when Ridley took the measurements and made the examination, that Ridley stated it could be used?

Mr. FIELD: I object to that.

Q. State exactly what Ridley said about using the cooker at the time that he made the examination and took the measurements?

298 A. I was asking him what shape that cooker is—he said to me you can use that cooker for a few—couples of brews yet and I think about that time we can fix the bottom for you.

Mr. CHILDERS: I know that the witness—either I misunderstand him off the stand, or fail to understand him on the stand; one or the other—I think it is on account of the use of language, his being German—

Q. What do you mean by a couple of times—do you mean a few times or a couple of times?

A. A few—couple of times, about five, six or seven times, something like that.

Q. Did Schmitt know that Ridley had taken the measurements; did you ever have any talk with Schmitt about that?

A. I think he saw Ridley up there at the time.

Q. Did he speak to you about it?

A. Who, Schmitt?

Q. Yes?

A. Yes, he was asking what Ridley is doing up there and I told him he is taking the measurements.

Q. Now, on the morning of the 1st day of January—between that time and the first day of January, did you have any conversation with Schmitt about the use of that cooker?

A. No.

The COURT: That is between the times when Ridley was there—

Q. Between the last time that Schmitt fixed it—

Mr. FIELD: That is not the question; the question was between the time that Ridley was there.

299 Mr. CHILDERS: I did not mean that; I will withdraw that question.

Mr. FIELD:

A. A few—couple of times—about five, six or—swer that he had no conversation.

Q. Did you have any conversation between the time—except that about Ridley taking the measurement—and the time that Schmitt put that second patch on there?

A. Well, I was asking him and a while how the patch is, and he says it is all right.

The COURT: I do not think that is what you meant—I do not think your question was very clear.

Q. That is, I mean, between the time the second patch was put on there and the first of January?

Mr. FIELD: That is not the question nor the answer.

The COURT: That is not the question.

Q. What conversation except the conversation that you have stated you had with Schmitt about Ridley taking the measurements did you have with Schmitt between the time that you put the second patch on there and the first day of January?

Mr. FIELD: I object to that question because it assumes that the conversation with reference to the second patch was before the conversation with Ridley, when the witness has testified to the contrary.

Mr. CHILDERS: I do not think he has testified to the contrary.

300 The COURT: I got the impression myself, but possibly I am wrong about it.

Q. When was Ridley there to take the measurements with reference to the time—before or after the second patch was put on?

A. It was after the second patch was on—put on.

Q. About how long before the material for it was ordered, was he there?

The COURT: Does he know when the material was ordered?

Mr. CHILDERS: I think he does.

A. All that I know what Mr. Reed showed us on the stand.

Q. Who, Mr. Reed—Mr. Ray—

A. Mr. Ray.

Q. Well, you know about when it was ordered don't you; did you have anything to do with the ordering of it?

A. No.

Q. Who ordered it?

A. I didn't order it.

Q. Who ordered it?

A. My brother Jake.

Q. How long after the second patch was put on there was it that Ridley came there and took the measurement, if it was afterwards?

A. If I ain't mistaken, the second or third day afterwards.

Q. The second or third day after the patch was put on there?

A. Yes, sir.

Q. Now, between the time of the second patch was put on there—between the time that Ridley was there, you said a while ago—and the first day of January, you had no conversation with Schmitt about it, except what you have stated?

Mr. FIELD: I object to that as leading and suggestive.

Mr. CHILDERS: Withdrawn.

Q. What conversation did you have with Schmitt about this cooker between the time that he put the second patch on there and the first day of January, 1906, leaving out, now, what was said between you and Schmitt about Ridley being there—I am not talking about that now—between the time the second patch was put on there and the first of January, if anything was said about it, and if so what was it?

A. The only thing was said when the iron came: I told him, Schmitt, the iron was here for the cooker, that was all.

Q. Now on the first day of January, state what conversation, if any, you had with Schmitt about the cooker?

A. About the cooker, we didn't have any.

Q. Go on and state if you saw Schmitt on the first day of January?

A. I did.

Q. Where was he?

A. He was in the brew house cleaning up.

Q. What time of the day on the first of January did you see him?

A. Seven o'clock in the morning.

Q. What, if anything, did you say to him that day, about his work on the following day, or about the use of the cooker?

A. I gave the boys instruction for to hurry up and as soon as they

are done they can go home on account of it is New Years, and  
302 then they got done—this was quarter to eleven or eleven  
o'clock—something like that, and then before they went  
home, I said to Mr. Schmitt, I said, Joe, will you be here in the  
morning on time—everything ready—yes—and he went home.

Q. Is that all that you said to him?

A. That is all.

Q. Then you didn't say to him—is that usual or not for you to  
tell him that; is that your custom?

A. I was asking him every time we brew, in the morning whether  
he is on time to start in the brewing—that was the day before—  
and every evening before they went home.

Q. You didn't say anything to him then about repairing—having  
this cooker repaired?

A. No, sir.

Q. Now, on the 2nd day of January, did you see Schmitt or not  
before the accident?

A. I didn't see him before the accident.

Q. Now, go on and state when you did first see him and how you  
happened to go there?

A. It was about 6 o'clock in the morning—there was one of our  
ice drivers—he comes over to the house——

Q. What is his name?

A. Adam Fisher, over to the house, knock at the door and says,  
Henry, hurry up, something happened over at the brewery, and he  
says, quick—hurry up so you get over there; so I put on my clothes,  
opened the door and dressed myself on the road running over there.  
I caught Mr. Fisher this side of the railroad track and I was asking  
him what was the matter. He says you find out when you go in  
the yard here. I went in the yard with Fisher—I said to Fisher, it  
looks fine here, doesn't it——

Mr. FIELD: I think we have had enough about that conversation.

Q. Go on and state where you found Schmitt and what  
303 he was doing, and you can state what you found there in the  
brew house, as you went by?

A. I was asking for Schmitt right away and if I ain't mistaken,  
Louis Overmeyer came out of the bottling works door from the  
office when I went in—when I came in close to him, he says, Henry,  
look what happened to me——

Q. That is, Schmitt?

A. Yes, sir; then I inquired whether he telephone for the doctor.  
He said, yes, they did. I was asking to whom—Dr. Carns, so we  
telephoned, if I ain't mistaken about three times before Dr. Carns  
came up—we could not wait fast enough until the doctor comes up  
and when the doctor came he dressed him up and took him in his  
house.

Q. Well, when did you next see Schmitt?

A. When?

Q. Yes?

A. Right after the accident.

Q. You didn't see him after they took him to his house, did you, till they took him to the hospital?

A. I went up to his house about ten o'clock that same morning.

Q. How did you find him then?

A. He was asleep.

Q. You had no conversation with him at that time?

A. No, sir.

Q. After that when did you see him? or where was he—after you saw him at his house on the same day of the accident?

A. I saw him up at the hospital.

Q. About how long after the accident was it that you saw him at the hospital; fix the date if you can?

A. It was the first Sunday after the accident.

Q. Do you know what day of the week that would be; do you know what date of the month that would be—the accident was on the 2nd, was it not?

A. Yes, sir.

304 Q. Do you remember what day of the month New Years came on that year?

A. That was Tuesday, if I am not mistaken.

Q. How did you find Schmitt. Go on and state how you found him and what you said to him; how he was doing?

A. Why, when I came up to the hospital, I told the sisters who I am and whether there is a chance to see Joe Schmitt—he says you are Mr. Loeb—

Q. Well, they let you see him, didn't they?

A. Yes, they let me see him.

Q. State how you found Joe Schmitt, what you said to him and all about it?

A. I went in his room; he was in bed; I looked at him and he looked at me, and I was asking, Joe, have you got trouble, pain yet; he says, yes, it hurts me awful bad; so I didn't want to bother him very much and didn't talk very much with him and went home.

Q. Well, did he appear to know what he was talking about to you; how did he appear to you as to being rational and understanding you?

A. Well, I was asking him how he feel—he told me he had terrible pain yet.

Q. Could you tell from what passed between you whether he was rational or not?

A. The way it looks to me, he talks nice and plain—just a few words.

Q. When did you see him next?

The COURT: Did he say what day of the month that was?

Mr. CHILDERS: That would make it the 7th.

Mr. FIELD: If Tuesday was the 1st day of January, the 6th was Sunday.

305 Mr. CHILDERS: Saturday was the 6th; I looked at the calendar.

Mr. FIELD: I think the first day of January, 1905, was Monday—

The COURT: I think you might as well get that straight—you mean 1906.

Mr. CHILDERS: I am quite sure that Sunday was the 7th.

Mr. FIELD: I had made up my mind some time ago that Sunday was the 7th.

Q. When did you see Schmitt after that, after the first visit of yours to the hospital?

A. I think it was next Thursday, the same week; I walked up there.

Q. How was he then?

A. Well, he told me the same thing, that he has terrible pain, yet, and I asked him how he feels?

Q. Is that all you did, just ask him how he felt?

A. Yes, I didn't ask him very many questions—just how are you getting along, that is all.

Q. He understood you, didn't he?

A. Oh, yes; he gave me a fair answer.

Q. How often did you see Schmitt after that, while he was at the hospital?

A. I was up there pretty near every Sunday and some times during the week.

Q. Now, to come to the brewery in the morning on the 2nd of January; what did you find to be the condition of things in the brew house, when you got there?

A. I didn't went into the brew house, until about 15 minutes after Joe Schmitt was gone to his home.

306 Q. Before you went to it, you passed along by it, when you came in, when you came into the yard?

A. I did not get there.

Q. You passed along the brew house, when you came into the yard?

A. I do not understand that.

Q. All right—15 minutes after Joe Schmitt was taken away what did you find then; go on and describe it?

A. I went right in the brew house and I could not for steam and the mash, so I took the water hose and washed some of that stuff off the steps, and I thought there must be something wrong upstairs and while I go cleaning out things I ran up and looked at that steam valve.

Q. Which steam valve?

A. Inch and a half valve, and I found that open. I shut it quick and had to run down again. Then it took about half an hour before the steam was all out of the building.

Q. How much open was this valve?

A. Why, it had two turns.

Q. Did that let on the steam full head or not?

A. No, not exactly full.

Q. What pressure did that make?

Mr. FIELD: I object to that, until it is shown it is possible for this witness to tell what pressure would be made by the turning of that valve.



Q. If you know?

Mr. FIELD: I think it must be something more than that, he must qualify himself as an expert to testify to that.

Mr. CHILDERS: I will qualify him.

307 Q. You attend to that cooker yourself—you attended to that cooker yourself for how long and did the breweing and used this valve for how long?

A. Why, about the valve—they really had.

Q. How long, I said?

A. How long I used the cooker?

Q. Yes, did you use it yourself personally?

A. Yes, sir.

Q. How long, how many years, weeks, months and days?

A. Since 1893; of course, not steady. In summer time when — were awfully *business*, my brother Jake tended to that.

Q. Well, you used this valve during that time?

A. Not exactly this valve—we have to change that once in a while.

Q. You had a steam gauge on there?

A. Yes, sir.

Q. State whether or not you knew from your use of this valve how much pressure would be made by turning it on?

Mr. FIELD: I object to that, because it is a matter of common knowledge that the amount of pressure in an instrument of this sort is regulated by the safety valve and not by the amount of steam going into the instrument.

Mr. CHILDERS: It is not all, if the safety valve didn't work.

After argument:

The COURT: Overruled.

Mr. FIELD: Exception.

308 Q. Do you know from your use of it how much pressure it would make by turning on the valve, in the use of it?

A. That is something I cannot tell; all I know, takes about 15 minutes—by two turns it takes 15 minutes and the cooker is under pressure and that is all I can state.

Q. You understand about setting the safety valve, didn't you?

A. Yes, sir.

Q. You stated yesterday that you used this big weight, or this morning?

A. Yes, sir.

Q. All the time that you were brewing there yourself?

A. Yes, sir.

Q. Then how did you regulate the pressure with that big weight?

Mr. FIELD: Objected to as cross examination of his own witness.

The COURT: Do you mean by that how much pressure on the safety valve was produced when that weight was used?

Mr. CHILDERS: Certainly; he says he used it all the time. I asked him that in that connection.

After argument:

Mr. CHILDERS: The last question is withdrawn.

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Q. I ask you how you regulated the pressure when you used this big weight?

A. Why, shoving it back and forwards on the lever.

Q. When you shove it back and forwards, can you state, 309 or not, what changes in the pressure the change in the position of the weight would make?

A. My gauge will show that.

Q. Your gauge shows the number of pounds of steam on?

A. Pressure.

Q. Show the pressure?

A. Yes, sir.

Q. Well, the gauge always showed the pressure then, did it?

A. Yes.

Q. Then I will ask you to state—did you ever notice when this wheel was on there?

A. Not as long as I was making beer.

Q. Now what pressure did you cook with?

A. Between 18 and 20 pounds, with that big weight.

Q. And you got the 18 and 20 pounds—where did you have this weight on the lever then—what part of the lever did you have it on?

A. When I had it on the pressure and the safety were blown, I shut my steam valve off on the side.

Q. That is not an answer to the question; the question is whereabouts on the lever, at the end, or middle, or where—about how many inches from the safety, was this weight placed at the time when you got your 18 or 20 pounds of pressure?

A. I guess it is about between seven and eight inches to the end.

Q. And how many turns of the wheel—of the valve—of the wheel—of the valve—did you give the inch and a half valve to get that pressure; how many turns of the wheel did you give to get that pressure?

A. Two turns.

Q. Now, I will ask you to describe to the jury the process that you go through with—just like it is—of preparing the cooker and placing the material in there and doing the brewing; what is the first thing you do?

310 A. Even before we start brewing, we pump 19 barrels of water in the cooker.

Q. Right here now, how many barrels of water would that cooker hold?

A. I think it holds 66 barrels.

Q. State what is the most you ever had in it; what is the greatest amount of water you ever had in it?

A. For sparching water, we make it plum- full every time.

The COURT: What is that?

Mr. CHILDERS: That is some process they have, I do not understand it.

Mr. FIELD: That is cleaning out the cooker, is it not?

A. No.

Q. What is that sparching done for?

A. To wash out the malt in the mash tub under the cooker, where you draw off the juice from the malt.

Mr. CHILDERS: I guess that is what we call malt extract.

Q. Now, the evening before you put in 19 barrels of water—that is all you do on the evening of the first day?

A. To have it ready for the next morning.

Q. Well, what do you do the next morning?

A. The next morning we will start the engine, and stir that water with kind of a rake on the inside—stir that around, and the same time, we run about 500 pounds of malt into it, heat it up in 15 minutes to 40 degrees Ré-umour; then run in your grits, between 40 and 45, that takes about 10 minutes to run that in; then close up your man hole, mash up in 15 minutes to 54 degrees—

Q. I understand you to say that during this time the steam is shut off—this 15 minutes?

A. It is turned on very slow—it is temperature right slow.

Q. Very little steam in it?

A. Yes.

Q. That is the upper valve?

A. Yes, sir.

Q. How was the lower valve, closed or not?

A. That is closed.

Q. Now, go ahead?

A. Give your steam valve two turns—no—leave it right slow—mash up to 54—that takes about 15 or 20 minutes—when it is up to 54 keep the mash going steady for 30 minutes—shut off your steam valve, but leave on a little crack, so the temperature stay on the same point; after the thirty minutes, give your valve two turns, open that half inch valve on the bottom, wide open, that brings it under pressure in about 15 minutes and as soon as it is under pressure and the safety blows, shut off the half inch valve in the bottom, shut off your side valve, give a little crack so the mash stands in the same pressure all the time—keep her in there for 15 minutes and run it down in the mash tub.

Q. What degree of heat did the mash heat to when the safety would blow off?

A. 88 to 90 Ré-umour.

Q. I will ask you whether or not mash could be made in that cooker without any pressure?

A. Yes, sir.

Q. How could it be made?

A. When it comes to boiling point you have to watch it so it won't boil over, you have to keep it boiling.

Q. How about the man hole?

312 A. You can leave that open.

Q. State whether or not you have ever known it to be made in wooden tanks?

Mr. FIELD: Objected to as wholly immaterial.

The COURT: Objection sustained.

Mr. CHILDERS: Exception.

Q. Now, coming back to the brew house on the morning of the 2nd of January, you ordered it cleaned out; state what you did after you got there, after you turned the steam on; or before that, how did you find that lower valve, open or closed, when you first went up there?

A. The lower valve was closed.

Q. After you turned the steam off at the upper valve what did you do or have done?

A. I took about three men there to clean up.

Q. Well, state how you found the mash with reference to the walls, the floor and ceiling?

A. Why, it was all over the building. I do not think there was a space of six inches square that was not covered.

Q. Ceiling, as well as floors—ceiling and sides, too?

A. The ceiling—no, of course, the ceiling was not as thick as it was on the walls and all over.

Q. What was the height of the ceiling; how far above the floor was the ceiling?

A. The ceiling, I think, is about 26 or 28 feet.

The COURT: Does he mean the first ceiling—this half floor, or what?

313 Q. You mean 26 or 28 feet from the ceiling, not the half floor?

A. No, the ceiling.

Q. How far above the lower floor was the platform, the half floor upon which the cooker was sitting?

A. Between 14 and 16 feet.

Q. Pretty close to about half way up the building then?

A. Yes, sir.

The COURT: Now which ceiling was he talking about when he was describing the condition of it?

Q. When you say the mash was on the ceiling do you refer to the half floor or the one above that?

A. The one above.

Q. Now, how long have you known Joe Schmitt?

A. Since he started to work, since 8 years ago, about.

Q. State whether or not you ever observed his hands before this accident happened, did you ever look at his hands before the accident?

A. All that I know about his hands, his fingers was like this (indicating).

Q. Which fingers and on which hand?

A. Both of them.

Q. Did you ever notice two fingers—

Mr. FIELD: I object; ask him what he noticed.

Q. State whether or not you ever noticed anything with reference to any particular fingers?

A. All that I know is two little fingers, they was like this, about (indicating).

Q. Which two fingers, show on your hand?

A. These two (indicating).

314 The COURT: Show to the jury.

A. Them two.

Q. Touch your two fingers, which you mean?

A. This one and this one (indicating).

Q. When did Joe Schmitt come back to work at the brewery; when did he resume work?

A. That is, after the accident?

Q. Yes?

A. I think it was the 14th day of May, if I ain't mistaken.

Q. Well, what did he do after he came back?

A. He been around the brew house and helped around, done light work.

Q. For how long did he do light work after he came back?

A. Pretty near all summer, till fall.

Q. Well, state who did the brewing during the time?

A. My brother.

Q. During the first summer—

A. Yes.

Q. Did Schmitt—did he ever commence to do brewing again?

A. Yes, he did.

Q. About what time did he commence to do the brewing after he came back?

A. I do not know whether it is exactly in the September, or start of October, beginning of October. He done it by himself there.

Q. Did he ever have any help or assistance; what assistance did he have?

A. My brother and he, they would do it together; they were together.

Q. When was that, before or after. After October that you and Schmitt, with your brother, were together—what do you mean by that?

315 A. I mean Schmitt—Schmitt and my brother, they were together making beer.

Q. When did your brother continue to work for Schmitt and how long; up to what time—not all the time did he?

Mr. FIELD: I object to the latter part of the question; it is leading and suggestive.

The COURT: The latter part can be left out.

Q. When did your brother continue to work with Schmitt and how long, up to what time?

A. Why, brother, merely the actual brewing of the beer, and when Schmitt came—

Mr. FIELD: I did not understand that.

Q. (Repeated).

The COURT: What do you say to that. They did not understand the answer, give it again?

A. My brother, he was in the brew house, brewing the beer when Mr. Schmitt came to work.

Q. That was in May?

The COURT: Has he finished his answer?

A. That was in May.

Q. Now, how long did your brother continue to take part in the brewing, in the brew house, after Schmitt came?

A. I think it was in October, the beginning of October—when Schmitt done it by himself.

316 Q. From that time how long—when did Schmitt quit the company?

A. About 2 months ago.

Q. From October until two months ago who did the brewing?

A. Joe Schmitt.

Q. Who helped him, if anybody, and what did his helpers do?

A. Not answered.

Q. Who helped Schmitt when he was trying to do the brewing since October?

The COURT: You better have the stenographer read the other question.

Mr. CHILDERS: I will substitute this for the other question?

A. Nobody, he had only one man to help him wash out one tub—the mash tub.

Q. Who was that man—was it the same man all the time, or different man?

A. It is different man, whoever we can spare.

Q. Now state how you did the brewing, with reference to how he did it before he was injured?

A. Sometimes my brother and sometimes myself.

Q. Did he do it well, or how; did he do it just as well before—as before or worse—or not so well?

A. Oh, yes; done it just as well.

Q. What were his wages before this accident happened to him?

A. \$20.

Q. How much did he receive since then—after he came back to work was there any increase in his wages since that time?

A. We increased the wages of every one of them.

Q. What was he getting when he quit?

A. \$21.

317 Q. State whether or not you know the wages that are paid to brewers in the country generally?

A. That depends upon what a man can do.

Mr. CHILDERS: That is all.

Cross-examined by Mr. FIELD:

Q. Did you keep a record at the brewery of every time that beer is made—do you keep such a record?

A. Yes, sir.

Q. Did you examine that record before you came here to testify.

Examine it as to the number of times that beer was brewed in that cooker between the time that Ridley was there and the day of the accident?

A. No, sir; I didn't examine it.

Q. By examining it you could have told this jury exactly how many times beer had been brewed between those dates, could you not?

A. Yes, sir.

Q. Will you, between now and 2 o'clock this afternoon, examine it and bring the record with you so that the jury may see it; can you state what date it was that Ridley was there to take the measurements?

A. It was in the end of November, or the beginning of December—the date I cannot state.

Q. If the records of the foundry show that they got that order for the new bottom on December 4th, then that was the date on which Mr. Ridley was at the brewery, is it not?

A. If I ain't mistaken, he was there before about a day or two.

Q. A day or two before?

A. When he took the measurement, it was the end of November or beginning of December.

Q. Well, when he took the measurement you gave the order to the foundry, did you not?

A. I did not give them the order.

Q. Why did Ridley come there?

318 A. Ridley came there to examine the cooker and take the measurement—that is, to examine the cooker—he didn't take the measurement the same time.

Q. Ridley came there once to examine the cooker and came another time to take the measurements?

A. Yes, sir.

Q. How much time elapsed between those two visits?

A. It was the next day.

Q. One day he came and examined the cooker; the next day he came and took the measurements?

A. Yes.

Q. Now, before he came to examine the cooker, you and Schmidt agreed that the cooker needed a new bottom, did you?

A. Yes, sir.

Q. And you said that you would have Mr. Ridley up to see it?

A. My brother sent him up.

Q. Your brother went there in pursuance of the conversation which you detailed between yourself and Schmitt?

A. Yes.

Q. Now, when was it—on which visit of Mr. Ridley was it that he told you that the cooker would last until a new bottom could be put in?

A. When he took the measurements.

Q. Now tell us exactly what he said?

A. Why, you can use that cooker for a couple of times—by that time you have got your cooker fixed, or the stuff is here to fix the cooker; that is, I was asking whether he got the material down

there—he says, no—they have to send for it; you can use that cooker yet until it comes.

Q. Now, he said you can use that cooker for a couple of times and by that time we got it fixed?

A. That is, he said the material will be here by that time.

319 Q. He didn't say by that time you have got it fixed?

A. Whether he had got it fixed—no.

Q. Did he tell you how long it would take to fix it?

A. If I can remember, he said it takes about a week after the stuff is here.

Q. Well, do you remember that he said that it would take about a week after the stuff was here?

A. I think that is right.

Q. He told you that you could use the cooker a couple of times?

A. Yes, sir.

Q. What was it you said about a few, couple of times—five or six times, in answer to Mr. Childers?

A. I mean that we can use the cooker till the stuff is here—the material from the foundry.

Q. You mean that he told you that?

A. No, he didn't tell me that, no; all what he said, you can use it a couple of times.

Q. Well, who said anything about using the cooker until the material came?

A. Ridley.

Q. What did he say?

A. Why, he said you can use that cooker until the material is here.

Q. Well, did he say that or didn't he say that?

A. He said that.

Q. Then he didn't say you can use that cooker a couple of times?

A. That is the way he said; he said you can use that cooker until the material is here and then we will put the bottom in.

Q. And he didn't say anything at all about the number of times you could use it?

A. No, not the number of times.

Q. All he said, you could use it until material came?

320 Q. Now, you say you never said to Joe Schmitt, that you wanted him to use that cooker—a couple of times and then you would get it fixed?

A. There was never a word said; he just kept on making beer when we were ready.

Q. Never was a word said about it?

A. No, sir.

Q. You are just as sure about that as you are sure about what Ridley said to you, are you?

Mr. CHILDERS: I object to that question; it is not proper cross examination; that is for the jury to say.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. Yes.



Q. You say that the first time that Schmitt ever said anything to you about the condition of this cooker was about the middle of November or the end of December?

A. I stated it was in the middle of November.

Q. You stated that at that time you told Schmitt that you would have Mr. Ridley up to examine it?

A. No, sir; it was later on.

Q. Well, now, the first time that Schmitt called your attention to the defects in this cooker, what did you say?

A. He told me he wants to cut out the boards in the bottom and wants to look at it—so he did.

Q. Is that all that was said?

A. Then he looked at it and called me there and there was a little—just like one drop—of course, there was nothing in the cooker—hanging there, that was all.

Q. That was all that was said and all that was done?

321 A. That is the same time.

Q. Now, at that time, I want you to tell all that was said and done by you and Joe Schmitt—the first time he called your attention to the condition of that tank?

A. He said we can fix that.

Q. He said we can fix that?

A. Yes.

Q. Well, was anything else said?

A. No.

Q. That was all that was done?

A. At the same time, yes, sir.

Q. Now, didn't you go into the cooker with Schmitt?

A. Not that day.

Q. Did you ever go into the cooker with Schmitt?

A. Yes, sir.

Q. When?

A. Many a times.

Q. Because he called your attention to defects in it?

A. Yes, sir; we went into the cooker and looked at the thing.

Q. When was this that you went into it together and looked at the thing?

A. Say about three or four days after we cut those boards loose in the bottom.

Q. Three or four days after you cut the boards loose?

A. Yes, sir; when we cut the boards loose of the bottom—it was a floor.

Q. Had there been a brew between the time that the boards had been cut away and the time that you went into the cooker?

A. That is something I cannot say.

Q. Well, you went in there with Schmitt after the boards were cut away to examine into the condition—into the extent of the defects to which he had called your attention a few days before?

322 A. Yes, sir.

Q. Well, at that time was anything said about having Mr. Ridley up to examine it?

A. No, sir.

Q. Well, now, I want you to tell everything that was said and done by you and Schmitt on the occasion when you went into the cooker to examine it?

A. Why, Joe Schmitt, he said he can fix that. He went to work, took a drill, drilled a hole, took a bolt, two washers and tightened it up.

Q. Did you see that process?

A. No, sir.

Q. Didn't pay the slightest attention to it?

A. That was done without I knowing anything—after we had that same—I had some other business to attend to.

Q. How do you know it was done, if it was done, without your knowing anything about it?

A. When it was done, he came down out of the brew house door and I just went up there, and he had the wrenches in his hands and he said, now it is fixed, it is good for another year; I said what—he said the cooker.

Q. That was before Mr. Ridley was there?

A. Yes, sir.

Q. Well, when was it; the next time he complained to you about the cooker?

A. It was about 10 or 12 days afterwards; 12 days after that.

Q. What did he say?

A. He said the cooker got a leak.

Q. What did you say?

A. I says, again, he says, yes; he says, well, I am going to put a clamp on it; so he did.

Q. Nothing said about Ridley then?

A. Then was said something about Mr. Ridley.

Q. Will you kindly tell us what it was?

A. I told Joe that we had to get Ridley up here and examine that bottom all the way around. So I told my brother Jake  
323 about it, and he went down in the foundry and let word there for to send Ridley up; so he did; he came up.

Q. Did Ridley come up the same day that you told Joe Schmitt that you would have Mr. Ridley up to examine this bottom all round?

A. No, I guess it was the next day when he came up.

Q. Then the day after that he came and took the measurements?

A. That day when he examined the boiler, or the cooker, I told him I would let him know, and so I can speak to my brother, and so I did speak to him and he went down in the foundry and the next day Ridley came up and took the measurements.

Q. Now, let us make a little calculation as to time, Mr. Loeb; you say that Schmitt first called your attention to the leak in the boiler on the 15th of November?

A. About that time.

Q. About 4 days after that you and he went into the cooker to examine it?

A. Yes.

Q. That would make it then, at least the 19th, would it not, when you were examining the cooker?

A. I cannot state exactly whether it was the 15th—I say in the middle of the month.

Q. Now the next day after you and Schmitt were in the tank examining it, your brother went to the foundry?

A. No, sir; not when we went in the first time.

Q. When was it?

A. After the second patch was on.

Q. Did you, or not, send to the foundry for Mr. Ridley until after the second patch was on?

A. Yes, sir.

Q. The second patch was put on 12 days after the first patch?

A. Yes, sir.

324 Q. The first patch was put on at least 4 days after the middle of November?

A. About that time.

Q. Now, don't that show that you didn't send for Mr. Ridley until about the 3rd or 4th of December?

A. I stated we sent for Mr. Ridley end of November or beginning of December?

Q. You didn't tell Schmitt the first time you and he went in there that you were going to have Mr. Ridley—

A. I told Mr. Schmitt that we send for Mr. Ridley.

Q. You told him then at that time you were going to send for Mr. Ridley, but didn't send for him for nearly two weeks?

Mr. CHILDERS: Which time?

A. It was after the second patch.

Q. I am asking you if you didn't tell Mr. Schmitt—if you have not testified here that you told Mr. Schmitt the first time you went into the tank with him to examine the tank, that you were going to have Mr. Ridley up here to examine it?

A. I do not remember that I said anything on the first time we went in—Schmitt and myself.

Q. Did you ever go in the second time to examine the condition of the tank with Schmitt?

A. No, sir.

Q. Now, I ask you if you didn't testify on your direct examination that about the middle of November, Schmitt took a keyhole saw and cut the floor out and you saw a drop of mash hanging at the bottom of the cooker, and told you that you ought to get the cooker fixed, and if you didn't say, I guess we go to the foundry and get Mr. Ridley up here to examine the cooker, and if you didn't further say that

325 the next day your brother went to the foundry and the next day Mr. Ridley came up; didn't you testify to that on your direct examination?

A. I testified after the second patch Mr. Ridley comes up.

Q. And you say now that Mr. Ridley was there twice?

A. Yes, sir.

Q. Once to examine the cooker?

A. Once to take the measurement.

Q. And another time to take the measurement?

A. Yes, sir.

Q. Did you testify to that on your direct examination?

A. I was not asked.

Q. Well, you didn't tell that on your direct examination, did you?

A. I ain't quite sure.

Q. You had been operating this cooker for how many years?

A. You mean in use?

Q. In use, yes?

A. Why, since 1893.

Q. I am talking about how many years have you personally operated it?

A. Well, I did not operate it—that is steady—we switched off once in a while, my brother and myself—the most of it I did.

Q. I want to get what statement it was you made on direct examination about the length of time you have been personally acquainted with the operation of that cooker?

A. Since 1893.

Q. Did you ever make any beer in it without pressure?

A. Yes, sir.

Q. When?

A. Oh, often.

Q. When?

326 A. Years ago; when we practice—practicing on it, to find out what results we was getting.

Q. Now, I want you to tell me some time when you made beer in that cooker without pressure and who was present when it was made?

A. It is a long time ago, when I cooked without the pressure, and there is nobody present; one man has got to do the work.

Q. The cooker was in the same condition then that it was on the 2nd day of January, was it?

A. No—the 2nd day of January, which year you mean?

Q. 1906?

A. That is that morning when he start to brew.

Q. Yes?

A. It was in the same condition.

Q. Now, you tell the jury—you are a brew master, are you not?

A. Yes, sir.

Q. And you tell this jury on your oath that it was possible to make beer in that kettle on the 2nd day of January, 1906, without pressure?

A. Could make beer any time without the pressure—all beer we could brew.

Q. Now, that cooker, connected up as it was with the steam of the boiler and depending upon that steam from the boiler for your heat, you could make beer without pressure and without any provision for carrying off the steam?

A. Yes, sir.

Q. Well, how could you do it, Mr. Loebs?

A. Why just leave the man hole open, bring your mash in boiling point—to boiling and when it boils shut off your steam so it keeps a little bit—let little bit blow in so it keeps a steady boiling for half an hour.

Q. That means with the valve opened two turns on the side?

A. Yes, sir.

327 Q. What would become of the steam that came out of the man hole? or would it all stay in there with the man hole open?

A. It would come out.

Q. And it would not cook the brewer at the same time it cooked the beer?

A. It don't do that?

Q. It would not cook the brewer at the same time it cooked the beer?

A. What do you mean by brewer?

Q. What would prevent the room, the brewhouse, from getting as hot as the cooker, if the place was open so that the steam could come out?

A. Why, when you cook with open steam, that is, without the pressure, it does not cook very fast—that is very fast—otherwise the thing would run over on you.

Q. Well, that steam would come out, if it were not confined, would it not?

Mr. CHILDERS: Let him finish his answer.

A. And that little steam, what that amounts to—that is very little not even about half as much as boiling under pressure.

Q. What would prevent the brew house from getting just as hot as the cooker, if the steam was not confined?

A. It is not impossible that the brew house get just as hot as the cooker, on account there is a stairway and not a floor above.

Q. Well, the brew house would certainly get full of steam, would it not?

A. It never did when I brewed; I generally open a window or two above.

Q. You brewed without pressure, with the man hole open, and the brew house didn't get full of steam?

A. Yes, sir.

Q. When was this?

328 A. I cannot tell exactly when, but I done it many of times.

Q. You cannot tell the name of anybody who ever saw you do it, can you?

A. Just as I stated, one man has got to do the work and whoever makes the beer has got to start in early in the morning and there is not anybody around except the man himself.

Q. Well you have to have an engineer to start the engine and make steam for you, even then, didn't you?

A. The engineer started the engine and after that he didn't have nothing to do in there any more.

Q. And you cannot tell the name of anybody who ever saw you make beer in that cooker without pressure and you cannot tell when you did it?

A. As I stated, nobody there and as I stated, I done it many, many times, boiling without pressure.

Q. Did you ever show Joe Schmitt how to do it without pressure?

A. I do not know whether—

Mr. CHILDERS: I object to that as immaterial and not proper cross-examination.

Mr. CHILDERS: Exception.

Q. (Repeated.)

A. I do not think I did.

Q. Did you ever make beer without pressure while Joe Schmitt was working for the brewery?

A. That is something I cannot tell.

Q. You say that you used that heavy weight No. 1, during all the time that you made beer in that cooker?

A. Yes, sir.

Q. What was the greatest amount of steam pressure that  
329 that weight would hold the safety valve against while you used it?

A. Between 18 and 20 pounds of pressure.

Q. That is the greatest amount it would hold?

A. The safety?

Q. Yes?

A. That is the weight for 20 pounds—you can put some more on, if you put some more weight on.

Q. In order to get 20 pounds of steam with that weight, you had to put it at the extreme end of the lever, didn't you?

A. Yes, sir.

Q. How much steam did you get with that weight when you put it at the other extreme end against the boiler—against the cooker itself?

A. Between 12 and 14.

Q. Then that weight would make a difference of from 6 to 8 pounds in being moved the full length of that lever and no more?

A. About that.

Q. You never knew of any other weight being used on that safety valve after Schmitt took it, did you?

A. He was using that safety as much as I know in the start—by himself.

Q. You never knew of his using any other weight on that safety valve, except that large weight?

A. He was using that little one.

Q. Well, when did he commence to use that little one?

A. That is something I do not know.

Q. When did you first find out that he was using that little one?

A. When I was making beer once this summer, one morning—one evening I want to say—he says I won't come round tomorrow—

Q. Was that after the accident?

A. That was this summer.

330 Q. We have no interest in that, Mr. Loeb; I want to know when, before the accident, you first knew that Joe Schmitt was using that small weight on that safety valve?

A. I first found it out after the accident, this summer, that he is using that.

Q. You didn't know before the accident that he ceased using that big weight?

A. That is something I do not know, whether he used it or not; the only thing when I found that he is using that little weight was this summer—one evening.

Q. Never mind about that: Your counsel will probably give you a chance to tell about that: Now, did you know that prior to the accident that Joe Schmitt had taken off that small weight—and was using that wheel as a weight on the safety valve?

A. That is something I did not know.

Q. You never heard of that before?

A. No, sir.

Q. You went in there after the accident that morning and he turned off that steam valve and you examined the lower valve and found that it was already turned off, but you didn't look at the safety valve?

A. No, sir.

Q. You didn't look at the safety valve at all?

A. No, sir.

Q. Now, when that safety valve is in proper condition, it works automatically, does it not, Mr. Loeb?

A. Yes, sir.

Q. And when you talk about raising the safety at the beginning at the brew, it amounts to raising the safety simply to see that it is working automatically?

A. Yes, sir.

Q. To see that it will blow off when the proper amount of pressure called for by the weight on it, is exercised against it from the inside?

A. Yes, sir.

Q. When you talk about pressure, what do you mean; you talk about 20 pounds of steam: what do you mean by that?

331 A. 20 pounds of steam, that is 20 pounds of steam on the boiler in the cooker.

Q. It means all the steam in the boiler weighs 20 pounds, does it?

A. Why you can put some more on, if you want to.

Q. I will ask you if when you talk about 20 pounds of pressure on the boiler that you mean there is 20 pounds of steam in the boiler?

A. That is not all steam: There is mash in there, too, in that cooker.

Q. Well, what does 20 pounds of steam pressure mean to you?

A. It is 20 pounds of steam; that is the only thing I can answer.

Q. 20 pounds to what?

A. That is something I do not know.

Q. You do not know whether it is 20 pounds to the square inch or the square foot, or to the square yard, do you?

A. No.



Q. You are about as expert in steam as you are in some other things, are you?

Mr. CHILDERS: I object to that question.

The COURT: Sustained.

Mr. FIELD: I save an exception.

Q. How many conversations with Joe Schmitt have you testified here about today and yesterday, Mr. Loeb?

A. I guess we had about three, something like that, you know.

Q. Now, tell me when they were—

A. You mean in account of the cooker?

332 Q. Yes?

A. One was in the middle of November, and about 12 days afterwards, and then when Ridley came.

Q. Those are the only times that you ever talked with Joe Schmitt about this cooker?

A. That is as much as I know.

Q. You heard Jose Schmitt's testimony?

A. Yes, sir.

Q. You heard him say that on the 1st day of January, 1906, you told him first, that he called your attention to the fact that that cooker was leaking again, when he was putting the water in, and that he asked you if you were not ever going to get it fixed, and that you replied that it ought to have been fixed before this, and you just use that cooker a couple of times more and it will be fixed, or words to that effect?

A. There was not a word said that day about that cooker. When I told Joe Schmitt about using that cooker a couple of times more, that was when the second patch came on, but on the first of January, there was not a word said.

Q. You did tell him then when the second patch was put on that you only wanted him to use it a couple of times more?

A. Yes, sir.

Q. Who were the men that you took in there on the morning of the second of January to clean up the place?

A. They were some of our men there.

Q. Well, who were they, what were their names?

A. Louis Markel, Louis Bossert and I guess Rudolph—no, he didn't work there—Nick Trujillo.

Q. Where is Louis Markel?

A. He is in California.

Q. Then the only other man who went in there at your instance that morning were Louis Bossert and Nick Trujillo?

A. I guess Nick was along with us.

Q. Are the only ones—

333 A. There was two of them, or three, I think.

Q. That was Bossert, Louis Bossert and Louis Markel?

A. Yes, sir.

Q. And Markel is not here?

A. No.

Q. Now, you say when you went in there before you took these men



in that there was not a place six inches square on that ceiling that was not covered with this mash?

A. I stated it was some on, but it was not plum covered, but the sides was plum covered.

Q. Has that ceiling ever been washed since?

A. Yes, sir.

Q. Who washed it?

A. The same men.

Q. Louis Bossert, Nick Trujillo and Markel?

A. Yes, sir.

Q. And washed it at that time on the second day of January, 1906, after the accident?

A. They had to take a shovel first and shovel it out.

Q. Did they have to take a shovel and shovel it off the ceiling?

A. No.

Q. How did they get it off the ceiling.

A. With a hose and broom.

Q. You say them do that did you?

A. Yes, sir.

Q. Both of them?

A. Yes, sir.

Q. How long were they at it?

A. Over two days.

Q. Now describe this mash to the jury; was it heavy or light?

A. It is light.

Q. How light relatively.

A. It is just like oatmeal or mash.

Q. It is not a good deal lighter than oatmeal?

A. No, sir.

334 Q. This process, doesn't it separate the grain from the shell of the grain?

A. The shell from the grits is off and the malt is on.

Q. And that shell is much lighter than the balance of the mash, is it not?

A. It is all mixed and boiled and there is the shell just the same as the rest of them.

Q. The shell is just as heavy as the balance of it?

A. Yes, sir.

Q. You swore to the answer—the amended answer in this case didn't you, Mr. Loeb?

A. Yes, sir.

Q. And in that answer you alleged that it was safe to use that cooker on the morning of the 2nd of January, 1906, at any pressure less than 10 pounds didn't you?

A. I didn't testify to that, did I?

Q. I am asking you if in the amended answer filed in this case on behalf of the defendant on the 8th day of November, as sworn to by you, you didn't say this: "That the plaintiff—that is Joe Schmitt—against the instruction and direction of the defendant, used the said cooker in the cooking of the said mash under steam pressure and at a pressure of over 10 pounds, and against the direc-

tion and instruction of the defendant, turned on steam at a high pressure, to-wit, at a pressure of over 10 pounds, for the purpose of cooking said mash at the time the alleged accident occurred, when no pressure for the cooking of said mash was necessary, and when any pressure not exceeding 10 pounds would have been safe." Did you swear to that in this answer?

A. In this answer I did, but not on the stand.

Q. Is that true?

A. Yes, sir.

Q. How do you know there was more than 10 pounds of pressure on that cooker that morning?

A. Why, the way the building inside looked.

335 Q. The only grounds you had for that statement was the appearance of the building when you got in?

A. Yes, sir.

Q. How do you know that the condition which you found there would not have been produced by six pounds of steam?

A. On account of the height of the building.

Q. You don't know the difference between six pounds and ten pounds of steam, do you, Mr Loebs?

A. Ten pounds give more pressure than six pounds—that is sure.

Q. You don't know when you speak about ten pounds, whether it is ten pounds to the square inch or ten pounds to the square yard?

A. It is something I do not know whether it is a square inch or a square yard.

— If your Honor, please, I ask your honor to send the jury in charge of an officer to inspect the place where this accident occurred.

Mr. CHILDERS: To which we object: I do not think it is usual to send the jury out to inspect premises.

Mr. FIELD: I think it is a matter resting in the discretion of the court.

Mr. CHILDERS: The jury has not expressed any desire to go.

Mr. FIELD: I think it would much facilitate the jury in understanding these questions and it would not consume any time unnecessarily.

Mr. CHILDERS: Counsel has made this request in the  
336 presence of the jury and I have no objection to the jury going, but it is my impression that it is not proper. I think it is contrary to law, but I do not care to discuss it at this time.

The COURT: It is quite customary to allow the jury to inspect premises.

Mr. CHILDERS: In some cases and under some circumstances, I have known juries to go out and inspect boundaries.

After argument:

The COURT: I think I should allow them to go: Under what instructions, Mr. Field?

Mr. FIELD: I ask your honor to tell the jury that they should when they start to make this inspection go from here in a body in the custody of an officer, who should be sworn not to communicate with them himself nor to *prevent* anybody else to communicate

with them and that they should go there and inspect the premises without any conversation between them, as to the premises or anything else: Just go and use their eyes and come back to the court house.

Mr. CHILDERS: Who is going to know where it is?

Mr. FIELD: The officer will show them.

Mr. CHILDERS: I think that shows that this sort — thing cannot be done.

337 The COURT: It is usual in Massachusetts for counsel on each side to go.

After argument:

Mr. CHILDERS: Our position is that we would like to have an opportunity to examine the law to see whether it is right or not.

Mr. FIELD: If there is any doubt about —, I would like to examine the law myself.

The COURT: I do not think there is any doubt of the power of the court to do it, but it seems to me that it is necessary for somebody to go along to point out. I will excuse the jury until 2 p. m.

Thereupon the jury retire from the court room.

Mr. CHILDERS: We object to the remarks of the court and the counsel on the subject of the jury going up to the brewery as prejudicial to the defendant's case.

Recess was here taken until 2 p. m.

At 2 p. m., again come the jury and the trial of this cause proceeds.

Cross-examination of HENRY LOEBS by Mr. FIELD resumed:

Q. Have you brought with you the records showing the number of times that beer was brewed at the brewery from the first of November, 1905, until the 1st of January, 1906?

338 A. Yes, sir.

Q. Will you show it to me?

A. (The witness leaves the witness stand and exhibits book to Mr. Field).

Q. That shows that in the month of November, you brewed on the 1st, 8th, 15th, 22nd and 29th, and in the month of December, that you brewed on the 8th, 16th, 21st and 27th?

A. Yes, sir.

Q. And that shows all of the time that beer was brewed during those months?

A. Yes, sir.

Q. And you testified on direct examination that you went to the hospital on the Sunday following the accident?

A. Yes, sir.

Q. And saw Joe Schmitt?

A. Yes.

Q. Did you say that you were asked who you were before you were allowed to see him?

A. Yes, sir.

Q. Who asked you who you were?

Mr. CHILDERS: I understood that that was excluded, the conversation between him and the Sisters.

Mr. FIELD: It might not have been competent for the gentlemen but it might be competent for me.

The COURT: I do not see how you can bring it out in cross examination.

Mr. CHILDERS: We make that objection also.

339 The COURT: I will sustain the objection.

Mr. FIELD: I save an objection, and offer to show by the witness that he was asked who he was before he was permitted to see Joe Schmitt and except to the refusal of the court to permit me to do it.

Q. You say you went on the Sunday after the accident, and on the following Thursday after that and then pretty nearly every Sunday, while he was in the hospital?

A. I stated that I was not quite sure whether it was Thursday—Thursday or Friday.

Q. Why, you said that the first time you went to the hospital was the Sunday after the accident, did you not?

A. Yes, sir.

Q. And didn't you say that the next time you went was Thursday of the same week?

A. I mentioned Thursday—Thursday or Friday, I think I mentioned.

Q. Well, what I want to know, Mr. Loeb, is how many times you remember to have gone to the hospital while Mr. Schmitt was there?

A. Say, about five or six times.

Q. Well, do you remember to have gone five or six times?

A. About that many times.

Q. Well, was it five or six?

A. That is something I am not quite positive—whether it is five or six.

Q. You say you went pretty near every Sunday?

A. Pretty near every Sunday, yes sir.

Q. How many Sundays did you miss?

A. I guess I didn't miss any.

Q. Do you say that you went every Sunday?

A. I am not quite sure that I did every Sunday.

Q. How many Sundays was he at the hospital?

340 A. I guess he was four Sundays up there.

Q. When did he leave the hospital?

A. I think on a Monday.

Q. It has been testified here that he left on the 28th of January?

A. I do not know whether the 28th was a Sunday or Monday.

Q. Well, can't you count it up?

A. It must have been on Sunday.

Q. Did you go to see him the day he left the hospital?

A. No, sir.

Q. Well, if he left the hospital on Sunday that is one Sunday you didn't go there?

A. No, I was not there that Sunday.

Q. How long before he left the hospital were you there?

A. The Sunday before.

Q. Had you been there during the intervening week?

A. I think after that visit I was not there any more of the week.

Q. You think the last time you were there was the Sunday before he left the hospital?

A. I guess that is right.

Q. Did you talk to him then?

A. Yes, sir.

Q. What did you say to him?

A. I asked him how he feels.

Q. What did he say?

A. He says he didn't feel very well yet, but he is improving pretty good.

Q. Was he still in bed?

A. No, sir; he was sitting up.

Q. Dressed?

A. I guess he had a kind of dress on—like that, just to throw over him—kind of blanket, something like that.

Q. Dressing gown?

341 A. Yes.

Q. Now, did you have substantially the same conversation with him the last time that you saw him at the hospital that you had the first time?

A. Why, we had been talking for a while together and he told me that Sunday he wished to go; he didn't like it here, and I told him to stay here for a couple of weeks, yet, until he is a good deal better and then all at once, I heard that he is at home—at With's house.

Q. Did you go to see him at With's house?

A. How often?

A. That is something I cannot tell, how often.

Q. You do not know approximately how many times you were there?

A. No.

Q. You say when you saw him at the hospital he was in so much pain that you didn't want to bother him and only asked him a few questions?

Mr. CHILDERS: Does that question relate to every time?

Mr. FIELD: That relates to the first time.

A. Yes, sir.

Q. All that passed between you that time was that you asked him how he was and he said he was in great pain?

A. Yes, sir.

Q. How long did you stay there?

A. Well, about between 5 and 10 minutes.

Q. You say that you have known Joe Schmitt ever since he has worked for the brewery?

A. Yes.

Q. And that prior to this accident he had a crooked finger on each hand?

342 Mr. CHILDERS: I didn't understand him to say that.

Mr. FIELD: That is what he said—if he didn't say——

A. I said I noticed that he had two little fingers—that his two little fingers were all standing right back (indicating).

Q. Didn't you notice that he had two crooked fingers on one hand?

A. No.

Q. You noticed his hands, didn't you?

A. Before the accident?

Q. Yes?

A. Yes.

Q. If he had two crooked fingers on one hand before the accident you would have known it would you not?

A. I did not pay very much attention to it, but we had been talking together these four years ago——

Q. I am not asking you your talk years ago; you testified here on your direct examination that you had known Joe Schmitt and you had seen his hands?

A. Yes, sir.

Q. And that his two little fingers were crooked—they were always crooked, that is, before the accident?

A. Yes.

Q. Now, I ask you if he had any other crooked fingers on either hand, except the little finger before the accident?

A. I am not quite sure.

Q. Well, did he have more than one crooked finger on either hand before the accident?

A. That is something I do not know.

Q. Well, don't you think, if he had, you would have known it?

A. I did not pay much attention to his hands.

Q. Well, I want him to show you his hands now and I want  
343 you to tell the jury whether his hands are in the same condition now that they were before the accident?

A. (Plaintiff stepping before the witness and exhibiting hands to him). Why pretty near the same, except this one here—this one was pretty near the same.

Q. You say they are just the same as they were before the accident?

A. The one—on the right hand, seems to be the same, but the other one is a little more bent, the way it looks to me.

Q. Well, I call your attention to the second finger on the left hand; I want you to say whether or not that was crooked before the accident, the way it is now?

Mr. CHILDERS: He has said he didn't know.

The COURT: That is before he looked at the hand.

Mr. CHILDERS: That would not refresh his recollection as to how they were before the accident.

The COURT: Objection overruled.

Mr. CHILDERS: Exception.

A. That is something I do not know.

Mr. FIELD: That is all.

Redirect examination by Mr. CHILDERS:

344 Q. I will ask you, when you were doing the brewing without pressure, if you kept two turns of that upper valve—did you mean to be understood as keeping two turns of the upper valve—that is keeping steam on with two turns of the upper valve, during the whole period of the cooking?

Mr. FIELD: I object to it as grossly leading and suggestive.

The COURT: Sustained.

Mr. CHILDERS: Exception.

Q. State, Mr. Loeb, what length of time when you were brewing without pressure, would you leave the steam turned on by two turns of the wheel of the upper valve?

Mr. FIELD: I object to that for the same reason.

The COURT: Overruled.

Mr. FIELD: Exception.

Mr. CHILDERS: I want to change that question.

Q. For what length of time would you leave the steam on when brewing without pressure by two turns of the wheel of the upper valve?

Mr. FIELD: I object to that because the witness has not said anything of that kind.

345 The COURT: I suppose you meant with pressure; I think his testimony was that with two turns, there would be pressure.

Mr. CHILDERS: Question withdrawn.

Q. For what length of time when you are cooking without pressure did you leave the steam on by two turns of the valve—of the upper steam valve?

Mr. FIELD: I object to that because the witness has never said that, when cooking without pressure, he used two turns of the steam valve, and as leading and suggestive and putting words in the mouth of the witness.

Mr. CHILDERS: He did say so.

The COURT: That is not my understanding of it. I may have misunderstood it. I do not think he said when he said he cooked without pressure that he cooked by two turns.

Mr. CHILDERS: I know the witness didn't want to make such a statement as that.

The COURT: You can ask him when he cooked without pressure what shape the valve was in.

Mr. FIELD: I do not understand that he had any more rights to lead the witness now than before.

346 The COURT: Do you want to ask him that?

Mr. CHILDERS: I will let your honor pass upon this question.

The COURT: I do not think the question is leading especially, but I think your question assumes that he has not testified to, that is my recollection of it. The objection is sustained to your question.

Mr. CHILDERS: Exception.

Q. When you were cooking without pressure, how did you get your steam for heating your mash which you put in the cooker?

A. Into the cooker—

Q. To get the steam to cook the mash in the cooker—how did you get the steam?

A. Why, through the same steam valve.

Q. Well, how many turns did you give it and which steam valve?

A. I would follow the same process than if I would cook under pressure.

Q. Through which valve did you get your steam?

Mr. FIELD: I object to that question, because it is not limited to one valve. He said he would do the same as if he were cooking under pressure.

The COURT: Overruled.

Mr. FIELD: Exception.

347 A. Through both.

Mr. FIELD: I think that illustrated that my objection was well taken.

The COURT: I will allow this witness to answer some questions now to clear up some doubt as to his testimony, rather than go back over the minutes to get at it.

Q. How much—how many turns would you give the wheel—of the upper valve, when cooking without pressure?

A. I would give it two turns, until it boils.

The COURT: That is all. Two turns—that answers it.

Q. How long would you let the two turns stay on?

The COURT: When cooking without pressure?

Q. When cooking without pressure?

A. Until it boils.

Q. Then what would you do with the two turns?

A. Cut it down to a little crack; keep a steady boil.

Q. On cross-examination, you said something about that little weight; something about it coming to your knowledge about the little weight last summer. What was that and how did it come to your knowledge—this one (referring to plaintiff exhibit 2)?

A. Which one?

Q. The little one?

A. Well, this summer there was one evening Mr. Schmidt he said when we was making beer, I guess he had one hour overtime going and we didn't pay him for that—and the next time we make beer, he says he don't come around anymore, and I says why—



Mr. FIELD: I object to it as not proper re-direct examination and having no bearing on the cross-examination.

The COURT: Go on.

Mr. CHILDERS: If objection is made that it is not proper re-direct examination, I should like to be reconsidered as recalling the witness for this purpose.

The COURT: The objection is sustained.

Mr. CHILDERS: Exception.

Q. Well, how did you discover that this little weight was being used and when did you discover it? When did you find it out and how did you find it out?

The COURT: When it had been used?

Q. Was being used or had been used?

A. I found that weight on the lever—the lever belongs on the safety—that morning what Mr. Schmitt didn't come around, I went over there myself and make beer.

Q. You say that was last summer?

A. Yes, sir.

Q. How did you find out that it had been used before the accident?

349 The COURT: Let us make sure here that it was last summer. Was it after Mr. Schmidt came back to work?

A. Yes.

Q. It is this summer?

A. 1907.

Q. Well, did you ever discover or nor that it had been used prior to the accident?

A. I did. It was hanging there that morning when I made beer, on the safety.

Q. State whether or not that is the only way that you know that it was ever used before the accident?

A. I cannot tell that—whether it was used before the accident.

Q. That is, you do not know whether it was used before the accident, or not?

A. No, I am not quite sure.

Q. On your cross examination you stated that when the second patch was put on the cooker, you said to Mr. Schmidt, that you do a couple of more brewings. I will ask you to state exactly what you did say to Mr. Schmitt and when you said it

A. I said that after Mr. Ridley took the measure of the bottom he told me you can use that cooker till the material is here.

Q. Now, it is after Ridley told you that, that you talked to Schmidt?

A. Yes, sir.

Q. What did you say to Schmidt?

A. That Ridley told that you can use that cooker till the material is here.

Q. State whether or not you asked him to use it at that time or any other time?

A. I did not ask him to use it.

Recross-examination by Mr. FIELD:

Q. What was it you said to Schmidt?

A. When, after Ridley took the measure?

350 Q. Yes?

A. That Ridley told me that we can use that cooker until the material comes in.

Q. And that is all you said to him?

A. Yes, sir.

Q. You never said anything to him about using it a couple of more times for brewing?

A. No.

Q. You are sure of that?

A. No.

Q. Are you sure that you did not?

A. Yes.

Q. Absolutely sure?

A. The most that I can remember, I never said anything else to him. He kept on brewing beer.

Q. Now, did you not testify here three, several times once on your direct examination and twice on cross examination that you told Schmidt that you wanted him to use that cooker for one or two more brews?

A. If I ain't mistaken, I testified that Mr. Ridley gave instruction to use it—allowed us to use it until the material comes in.

Q. Do you remember having said anything about a few, a couple of times and repeating that to Mr. Childers five or six times?

Mr. CHILDERS: I think that has all been gone over.

The COURT: I think I will allow him to go over it for the same reason I suggested awhile ago.

A. I mean by that, those few couple of times, that would do us til the material is here.

Q. Well, who was it said a few, couple of times; you or Mr. Ridley?

A. I said that.

351 Q. To whom did you say it?

A. To Joe.

Q. When?

A. After Ridley told me that we can use it till the material come.

Q. And you didn't tell him that Ridley said you could use it till the material came, but you told him that he could use it a few, couple of times?

A. I cannot remember that.

Q. Now, you say that when you cooked without pressure you used exactly the same process that you did when you cooked with pressure, except you left the manhole open?

A. I stated I make the same mash process up to boiling point, then I shut my valve off and boil right slow.

Q. But up to the boiling point, you use the same amount of steam obtained in the same way?

A. Yes.

Q. Well, now when you are cooking with pressure, you shut the valve off and only leave a little crack when it comes to boil, don't you?

A. Yes sir—no—that is when—when the safety is blown off.

Q. As soon as the safety blows off, you shut off your valve to a small crack?

A. Yes, sir.

Q. Now, the only difference in the two processes is that when you have got the manhole open, you have not got the safety valve to tell you when you have got the amount of heat you want and you have to watch that and see that it is boiling and then turn off the steam in the same way?

A. Yes, sir.

Mr. FIELD: That is all.

352 TOM MILET, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name?

A. Tom Milet.

Q. Where do you live?

A. St. Joseph's hospital.

Q. What is your business?

A. I am running the boilers up there at present. I am a professional nurse.

Q. You know Dr. Carns?

A. Yes.

Q. You know Joseph Schmitt, the plaintiff here?

A. Yes, sir.

Q. In the month of February, 1906, did you have anything to do with Mr. Schmitt?

A. I had nothing to do in the hospital with him, not until I was called out on the case in the latter part of January.

Q. January, or February?

A. Latter part of January, last two or three days of January and the month of February.

Q. State whether or not you were with Mr. Schmitt as nurse.

A. No, sir, I was not—do you mean up at the hospital?

Q. No, I mean after he left the hospital?

A. Yes, I went on Sunday afternoon and stayed with Mr. Schmitt four weeks.

Q. During that time state whether or not you heard any conversation between Mr. Schmitt and his wife in regard to two fingers on one of his hands?

A. Why, it was not with his wife.

Q. Did you hear any conversation——

A. I heard a conversation with his sister in the room, when Doctor Carns came to dress his hand. He told Dr. Carns and myself that it was hereditary in the family; that his little finger always was——

353 Q. Wait a minute, I have not asked for the conversation yet; I prefer you to give that in answer to another question.

Q. You heard such a conversation, did you?

A. Yes.

Q. The conversation was between whom?

A. Between Mrs. With his sister and Mr. Schmitt—Mr. Schmitt and his sister, Mrs. With.

Q. And the persons present?

A. Well, his brother was in there part of the time—he was not there all the time the conversation was going on.

Q. Who was that?

A. Joe Schmidtt's brother.

Q. And you?

A. And I was there.

Q. And there was conversation—and Mrs. Schmidtt—now state that conversation to the jury, all that was said and who said it?

A. Doctor Carns came up to dress his wound and I was there with him—I was out of the case—and after we got through, why Mr. Schmidtt spoke about his little finger always being just in that one position about; said it was hereditary in the family—and Mrs. With was there, Doctor Carns was present, Mr. Schmidtt was present, and myself, and Mr. Schmidtt's brother-in-law—was in and out through the house while the conversation was going on.

Q. State whether or not anything was said in the presence of Mrs. Schmidtt after Doctor Carns went away, by anybody?

The COURT: Has he said that Mrs. Schmidtt was there?

Mr. FIELD: No, Mrs. With.

A. After Doctor Carns left, Mrs. With came in and stated  
354 that would be one of the first things that they would bring up in the court, about his fingers being that way, saying it was that way in the family.

Q. Go on and state anything else that was said there on that subject?

A. I do not believe there was anything much more said after that. I did not pay much attention.

Q. What, if anything, did Mr. Schmidtt say?

A. Why, Mr. Schmidtt told his sister that it was the truth, that his finger always was, and that it was in the family—the children—that the little finger was always a little bent and not the burn that caused it.

Cross-examined by Mr. FIELD:

Q. When did you first repeat this conversation and to whom?

A. You mean after I left the house?

Q. After you heard it?

A. I do not just remember who I did repeat it to.

Q. Did you ever repeat it before you repeated it here on the stand?

A. Yes, sir.

Q. When?

A. Why, it was quite a while after that that I repeated it.

Q. To whom did you repeat it?

A. Why, Doctor Carns, I believe was the first one I told it to.

Q. When was it and where was it? And who was present when you first told it to Doctor Carns?

A. I believe it was in his office I told him. I do not know whether there was anyone present or not when I said it.

Q. When was it?

A. Why, it must have been about—it was quite a while after I left the case—I do not remember just how long it was.

Q. When did you next repeat it?

A. Why, I believe I repeated it to Mr. Marron.

355 Q. When?

A. Why, Doctor Carns and myself—I think it was over in his office that we repeated it.

Q. When was that?

A. I imagine this was nearly six or eight months ago.

Q. At Mr. Marron's office?

A. Yes, sir.

Q. At whose solicitation did you go to Mr. Marron's office?

A. I was called down there by Mr. Marron.

Q. You met Doctor Carns there, did you?

A. I think Doctor Carns was there, yes, sir.

Q. Was there anybody else there?

A. Why, his stenographer was there.

Q. Anybody else?

A. Why, there were several people in the room that I did not know.

Q. Anybody else there connected with this case but you and Doctor Carns?

A. That is all.

Q. Did you make a statement at that time to Mr. Marron with reference to this conversation?

A. Yes, sir.

Q. Did Doctor Carns make a statement at the same time about it?

A. Yes, sir.

Q. Was that statement taken down in writing?

A. Mine was taken down; I do not know whether Doctor Carns' was or not. I was not there with him all the time.

Q. Yours was taken down?

A. Yes, sir.

Q. Was it afterwards written out and submitted to you?

A. No, sir, I never saw it after I gave it.

Q. When did you next repeat this statement?

A. I do not believe it was repeated at all after that.

356 Q. The only times you repeated it was once to Doctor Carns in his office, after you left the case some months?

A. Yes, sir.

Q. And once at Mr. Marron's office about six months ago, when Doctor Carns was present?

A. Yes, sir.

Q. Well, now will you kindly repeat it just once more?

A. Why, Doctor Carns came one morning to dress Mr. Schmidt—after he had dressed the case he went away and Mrs. Schmitt came in—or Mrs. With rather and told Mr. Schmidt that he had no right saying anything like that; that Doctor Carns and the nurse would simply bring that up in court if it ever came on trial.

Q. Well, you are a little ahead of your story?

A. Do you want the whole story?

Q. Yes, that is what I want?

A. Well, Doctor Carns was dressing the hands, and while he was dressing the hands, Joe points his finger to him and told him about it and Mrs. With was in the room and myself and Mr. Schmidt.

Q. What did he tell him about it?

A. The doctor noticed that his hand was crippled and he asked him was that always that way and Joe told him yes.

Q. Did Doctor Carns dress both hands that morning?

A. Yes, sir.

Q. And you are perfectly sure that Joe Schmidt showed him a little finger that was crooked and told him it was always that way?

A. Yes, sir.

Q. On which hand was that?

A. Why, if I remember rightly, I think it is the right hand.

Q. And it was only the little finger?

A. Just the very little finger.

357 Q. He didn't say anything about any finger on any other hand having always been crooked also, did he?

A. No, sir.

Q. You are absolutely certain of that?

A. I would not say whether I am absolutely certain whether the right or left hand, but I state I am pretty sure it is the right hand.

Q. And you are absolutely certain it was only the little finger he talked about and the little finger of one hand?

A. Yes, sir.

Q. He didn't say anything about having two fingers on one hand and one finger on the other crippled, that had been that way all his life?

A. No, sir.

Q. You know you cannot be mistaken about that?

A. Yes, sir.

Mr. FIELD: That is all.

THOMAS ISHERWOOD, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name?

A. Thomas Isherwood—I am a little deaf.

Mr. CHILDERS: I am under the necessity of excusing this witness for a moment to call Mr. Loeb. I had forgotten one matter that I wanted to show by him.

Thereupon the witness was excused for the present.

HENRY LOEBS recalled, as a witness in behalf of the defendant, testified further as follows:

358 Direct examination by Mr. CHILDERS:

Q. State what was the thickness of the iron out of which this cooker was made; the steel—which was it, iron or steel?

A. Steel.

Q. What was the thickness of it?

A. It is three-eighths steel iron.

Q. How long had it been in use?

Mr. FIELD: I think he testified to that.

Mr. CHILDERS: Question withdrawn.

Q. I will ask you to state when you were up there after the accident if you made an examination of this cooker?

A. Yes, sir.

Q. The two patches that you have testified about, were they put on at the same place, or different places on the cooker?

A. It was about a place four inches long.

Q. Now, answer this—were the two patches put in the same place or different places?

A. There was only one patch.

Q. I mean that bolt and the patch that Schmidt put on there?

A. The first patch he took out and made one out of the two—one patch.

Q. So that, after he got through with the second one there was only one patch?

A. Yes, sir.

Q. Now, I will ask you where the break was in the cooker with reference to those patches?

A. Why, facing the cooker, it is on the left hand side from the patch.

Q. How far from the patch?

A. Why, on the end of the patch.

359 Q. The end of the patch?

A. Yes, pretty — an inch away from the patch—on the end.

Q. How far was the patch from the wall—up from the bottom of the cooker?

A. If I can remember it was about an half inch away from the wall.

Mr. CHILDERS: That is all.

Mr. FIELD: No questions.

Mr. CHILDERS: I have one question more.

Q. How much of a break was there in the bottom; what was the extent of the break?

A. It was about—a crack about 18 to 20 inches long.

Q. Where was that with reference to what I have called the wall—the cylindrical part of the cooker, above the bottom?

A. Why, the wall in a square tank—what you call it—

Q. It is not square is it?

A. No, it is round.

Q. That is what I mean? How far was the crack in the bottom from this part—from where this joined on the bottom—from where the upper part joined on the bottom?

A. If I ain't mistaken, it is about an inch and a half away from it, it is pretty long ago and I do not remember well.

Cross-examined by Mr. FIELD:

Q. How wide was this crack, 18 or 20 inches long?

A. Why, it went kind of pointed.

360 Q. Well, can you give the jury an idea of the size of the hole in the bottom of the tank?

A. It is about, on this end next to the patch—there is about half an inch and it went all the way further out to smaller—with a crack.

Q. You mean it was half an inch wide at the widest part?

A. Yes, sir, about.

Q. And extended for about 18 inches to a point?

A. Yes, sir.

Q. Towards the wall?

A. No, it is all the way around—it is just the way the curve is.

Q. Went around the curve?

A. Just the way the tank was built.

Q. And was the widest near the patch?

A. Yes, sir.

Q. Was the patch still there?

A. Yes, sir.

Mr. FIELD: That is all.

THOMAS ISHERWOOD, recalled as a witness on behalf of the defendant, testified further as follows:

Direct examination by Mr. CHILDERS:

Q. What is your business, Mr. Isherwood?

A. At the present time I am manager of the Hewitt Mfg. Co.—manufacturers of kettles—in Chicago.

Q. Where do you reside?

A. Albuquerque.

Q. How long have you resided here?

A. 26 years last July.



Q. What business have you principally been engaged in since you have been here?

361 A. Iron and brass, principally—and boilers—iron work—brasswork.

Q. What is your trade—occupation?

A. Generally iron works business, first in the boiler shop—when I was a young man and the first part of my apprenticeship and then I took iron and brass moulding.

Q. Do I understand you have been engaged in the making of boilers?

A. Yes.

Q. For how long?

A. Since 1863.

Q. Have you been engaged in it more or less all your life or not?

A. I have never done anything else.

Q. You then are acquainted with the mechanism of a boiler and the way it is operated?

A. Yes, sir.

Q. Now, I will ask you to look at these three weight- (showing plaintiff's exhibits 1, 2 and 3) these two balls and the wheel, and we will assume that No. 1, the larger one, weighs five pounds or eighty ounces and the smaller ball two pounds, or forty-three ounces—two pounds and eleven ounces or forty-three ounces, and that the wheel weighs thirteen ounces, and that they are used as weights for the safety valve on a boiler, and that they are hung at the extreme end of the lever—fartherest end from the safety, in what proportion, what ratio, with reference to their weights will these three objects—the two balls and the wheel, hold down steam and prevent its escape?

Mr. FIELD: I object because this is a hypothetical question not based on the evidence in the case as nobody has testified that these two smaller weights were used at the end of the lever, and further because the witness has not testified that he can form an opinion as to the question, about which he was asked.

362 After argument.

The COURT: Objection sustained.

Mr. CHILDERS: I will save an exception.

Q. What would be the relative effect as to closing the safety valve—closing and preventing the escaping of steam, in the use of these three weights, placed at the same point on a lever attached to a safety valve, compared with their weights—their respective weights?

Mr. FIELD: To which I object, because there was no evidence that they were placed at the same point on the lever.

The COURT: I think I will let him answer that question.

Mr. FIELD: Exception.

A. I do not quite understand this question; how to answer that.

Q. The question assumes the safety valve to be in working order and intended to be closed until the steam reached the pressure at which it is desired that the safety valve permit the steam to escape?

A. Well, with the steam coming into the boiler, when it got to the certain pressure it would raise the lever up—

Q. Yes?

A. At whatever the gauge was set at to raise the certain weight.

Q. Now, the question is asked you—is what pressure in comparison—what comparative pressure of steam would be required  
363 to open the safety valve and permit the steam to escape—in comparison with the weights of these two balls and this wheel, in use, placed at the same point on the lever?

A. Well, that would depend upon the length of the lever.

Q. Well, assume that the lever was 10 inches long—nine inches outside of the safety valve, the other inch being required for its attachment to the safety valve?

A. Well, I should think the small one would be about three and a half pounds at nine inches—three and a half pounds to the inch—

Q. Which do you mean by the small one?

A. The small ball, three and a half to four pounds to the inch, and the large one would run, well, about eight or eight and a half.

Q. You are taking into consideration the weights?

A. Yes, taking in consideration the weights; that is as near as I can get at it—approximately.

Q. And the smaller one, the wheel?

A. The wheel added with them would probably bring it up to 11 or 12 pounds.

Q. I mean separate, the wheel separate—they are used separately?

A. Well, used separately, that wheel would not make much difference on the end of the lever at that length.

Q. Now, I will ask you to explain to the jury what is the effect of changing the position on the lever, moving it up and down, further away and closer to the safety, of any of these weights?

A. Well, as you move it any nearer to the safety valve, it would reduce—on all levers there is figures which indicate how many pounds—it would pop off that much easier.

Q. By much easier, you mean required much less pressure?

A. Yes, sir, that much less pressure—after you get a cer-  
364 tain amount of steam in by moving that—whatever you want the steam gauged—you watch the steam gauge, and w-e-rever it is placed to pop off, you put the weight—if it goes off before that you move it back.

Q. If it is said that this weight, No. 1, would keep the safety valve closed when placed at the end of the lever until the pressure reached 20 pounds and that then the safety valve would open—and then this weighs 80 ounces and the other weights, No. 2—the ball—t

The COURT: Why don't you compare one at a time, so as not to get it mixed. Compare the wheel, say with the larger one. I do not see how the jury will understand this.

Mr. CHILDERS: I will do that.

Q. If it is said that this weight, No. 1, will hold down when placed at the end of a lever nine inches long, the safety valve, until it reaches a pressure of 20 pounds, and this weight weighs 80 ounces,

how much pressure will this second ball, the smaller ball, require to open the safety valve, if this weighs 43 ounces, placed at the same point on the lever?

A. It would be just a little over half.

Q. State whether or not that is in proportion to the respective weights of these two balls?

A. It would be in proportion to the respective weights.

Q. Then take 80 ounces as the weight of the big one, No. 1, and that requires a pressure, say, of 20 pounds, to open the safety valve—that is four pounds—four ounces to the pound—?

A. That is the way they always figure it, four ounces to the pound.

365 Q. Could you take a pencil and figure it—the respective weights?

A. No, I could not figure it out.

Q. That is a matter of arithmetic?

A. Yes, sir, figuring it up.

Q. And the same thing would be true in comparison between the wheel and the weight, No. 1?

A. Yes, sir, in proportion.

Q. It would hold down four pounds of steam for every ounce that it weighs?

A. Yes, sir.

Mr. FIELD: What is that?

Q. Holds down a pressure of a pound of steam for every four ounces it weighs?

A. Yes, sir.

Mr. FIELD: Will resist pressure?

The COURT: In proportion to their respective weights?

Mr. CHILDERS: As a matter of physics, of course, it does not amount to anything more than that.

The COURT: I think we should try to get this simplified.

Mr. CHILDERS: That is a fact.

After argument and discussion:

Q. Now, if this small weight weighing 13 ounces was placed at the end of a lever extending 9 inches from the outside of the safety valve, leaving out the inch for attachment to the safety valve, to a boiler that would hold 66 barrels of water, and had a weight of 19 barrels of water in it, and an additional weight of 1900 pounds of other material, such as used for mash, constructed of iron, steel—steel iron, three-eighths of an inch thick, which had been used for several years, for the purpose of cooking malt at a brewery, and had a patch in the bottom of it, which had been recently put there to stop a small leak—a small hole in it—what would you say as to whether an explosion of that cooker—that boiler—could be caused by the use with the safety valve in working order by an amount of steam which would be retained in the cooker passing through a steam valve—steam pipe of an inch and a quarter in diameter, and another steam pipe half an inch in diameter, one entering the side and the other coming up through the bottom—

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Mr. FIELD: I object because it is a hypothetical question not based on the evidence in the case and because the witness has not been qualified as an expert.

The COURT: I do not recollect any evidence which was to the effect that it was placed at the end of the lever.

After argument:

Q. Is it not a part of a boiler maker's trade to know the laws of the resistance of steam?

A. We are supposed to know how much pressure a boiler will stand by examining the boiler—by going and looking at it, to ascertain what pressure of steam it will stand—we can ascertain that.

Mr. CHILDERS: Now, I renew my question.

367 The COURT: I think you might as well ascertain whether from the information given in that question, he can answer it—he can answer yes or no to that—Mr. Witness, now do you understand the question?

A. Yes.

The COURT: Well, now you can say yes, or no.

Mr. CHILDERS: I want to ask him if he can express an opinion from the information given him.

A. Yes, I can form an opinion.

Mr. FIELD: Without an examination of the boiler?

A. From the information Mr. Childers stated—he said it was an old boiler three-eight-s iron, holding so much water and so much other heavy material—

Mr. FIELD: And all you need to know is that is an old boiler made of three-eight-s iron?

A. Yes.

Mr. FIELD: And without ever seeing it, you can state how much steam it will carry?

A. He asked me the effect—if I understand the question and my memory serves me right, he asked me what effect it would have on the boiler.

Mr. CHILDERS: I object to this examination at this time.

The COURT: Mr. Field objects that you have not qualified him.

368 Mr. CHILDERS: He has stated he can express an opinion and he has testified that it is part of his business to know the resistance of steam.

The COURT: The question was whether you had qualified him sufficiently. Do you wish to ask him any questions, Mr. Field?

Mr. FIELD: I want to ask him some more.

Preliminary examination by Mr. FIELD:

Q. Do you mean to tell this court that you can tell how much steam a boiler will carry by being given its age and the quality of the iron out of which it is made?

Mr. CHILDERS: I object to the question as not proper at this time, because the witness has not been turned over for cross examination

and it does not go to the qualification of the witness to express an opinion.

The COURT: Sustained.

Mr. FIELD: Exception.

Q. Is it not necessary for a boiler maker, in order to express an opinion as to the quantity of steam the boiler will carry, to have information as to the state of wear to the boiler?

A. Why, certainly it is, but that is not the way I understand the question.

369 Mr. CHILDERS: I make the same objection. That is a matter of cross examination upon the opinion the witness expresses, and I move to strike it out.

The COURT: I—as I understand the situation it is that you wished to qualify him further as to the knowledge of the effect of steam; you have not asked about that.

After extended argument:

Q. I ask you this question: As an expert boiler maker and from your knowledge of steam, can you express an opinion—an intelligent opinion as to the amount of steam an old boiler will carry without inspecting the boiler?

Mr. CHILDERS: I object to the question as not proper at this time.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. I would state that I could not tell how much steam the boiler will hold without I had seen it. I would like to look at it to see how much it would hold; that is as far as I could go.

Mr. FIELD: I am through for the present.

Direct examination resumed by Mr. CHILDERS:

Q. If there is submitted to you all the facts and the length of time that a boiler has been used, the amount of steam pressure that it usually stood, for the purpose it had been used, the thickness  
370 of the iron or material out of which it is made, and any known defects in it, that may have appeared and any attempt that may have been made to remedy those defects—can you give an opinion as to whether a given amount of steam would ordinarily produce an explosion in that boiler?

A. Yes, sir, I can tell you very near how much steam it would carry, that is, approximately.

Q. Can you give an opinion?

A. Approximately.

Mr. FIELD: Is it not a fact Mr. Isherwood that, in determining the power and resistance of any given boiler, the question of how the boiler has been used, the amount of water that has been used in it—the kind of water that has been used in it, whether it has been properly or improperly kept, the effect of rust and erosion and a number of other things which could not be described by anybody, except by an expert boiler maker, are absolutely essential, as the basis of an opinion as to how much steam the boiler would carry?

A. Well, you could get at it, that is, approximately. I could not tell you the exact pounds it would hold without I knew the exact conditions, but I get a good idea how much steam it ought to hold with three-eighths steel, even though it had been used with any kind of water like we have in this country, without the water being treated—three-eighths—steel, new, ought to carry 50 pounds to the square inch; that is if new steel, but of course—since 1893—I never saw it—the boiler or never heard tell of it till yesterday.

The COURT: That last question, I think goes rather to the cross examination than to his qualification.

Mr. CHILDERS: It strikes me so.

371 The COURT: He has said that he could answer that question of yours, Mr. Childers. He may answer it.

Mr. FIELD: I save an exception.

The COURT: The stenographer will have to read it again.

(The stenographer here read the former question referred to.)

Mr. CHILDERS: I want to reform my question, because I put him a general case.

The COURT: Go on with your question.

Q. If a boiler had been in use since 1893 for the brewing or making of mash in a brewery, made of three-eight-s inch boiler steel, the capacity of which was 66 barrels of water, and having in it 19 barrels of water and 1900 pounds of malt—of grits and malt, used for cooking this malt with steam, furnished by two steam pipes, one an inch and a quarter in diameter entering on the side and the other steam pipe half an inch in diameter entering from beneath—below, and the steam was turned on for the purpose of cooking the malt in the boiler, and this weight, weighing 13 ounces was used on the lever, placed at the extreme end of the lever from the safety valve, the previous defect in the boiler having been a hole which had been patched with a bolt of iron, bolted to it so it didn't leak around the edges of the plate of iron—half inch iron being used for the patch, in your opinion, could an explosion take place from the amount of steam if the steam gauge was working properly which would

372 be—required to cause the safety valve to open and permit the steam to escape with this weight used as I have indicated in this question?

Mr. FIELD: I do not wish to take up time on this, but I want my objection which I made to the other question to stand as to this question.

The COURT: Yes. Overruled.

Mr. FIELD: Exception.

A. Well, if the steam was turned on, was turned on slow—with a weight that size—had this wheel at the end of the lever nine or ten inches long—with the steam turned on slowly, in my opinion it would have very little effect on the boiler, but if it was turned on right quick, why, it would strain the boiler considerably, even with that, if turned on quick.

Q. I will add to that question, if there were two turns of the

wheel, regulating the valve attached to the inch and a quarter pipe—I will add that to the question asked before?

Mr. FIELD: I object to that because that does not give the witness any information at all.

Mr. CHILDERS: I do not know whether it does or not.

The COURT: That is for the witness to say whether it does or not.

373 A. That would depend a great deal on the make of the valve, I should judge, as to opening it two turns—if you open it two turns right quick, it would effect it the same way—it would depend upon the valve.

Q. Well, assuming this wheel with the safety valve in working order—assuming that the safety valve with this wheel being on the lever—I will change that—being in proper working order, would open with a pressure of three and a quarter pounds, what would you say as to whether or not that would cause an explosion?

A. I should not think it would cause an explosion.

Mr. CHILDERS: That is all.

Cross-examined by Mr. FIELD:

Q. Now, suppose you were told that the boiler did explode in just exactly that manner, with that wheel on the lever, and when there was not exceeding six pounds of steam in the boiler; would you say that was impossible?

A. Well, my experience in turning on steam on a boiler—

Q. Now, just answer my question: under any possible conditions of that boiler that you could imagine, taking into consideration all the information you have from the questions of counsel for the brewery company, now, if you are told that under those circumstances, that boiler did explode with that wheel on the lever, and with not more than six pounds of steam in it, would you still say that was impossible?

A. It would depend a good deal on how the man turned the steam on because if turned on with a rush, then it drops back.

Q. Well, can you answer my question: could that boiler explode under the exact conditions described by Mr. Childers to you, when there was a pressure of not exceeding six pounds of steam in it: I do not care how the steam got in there?

374 A. No: I do not think as Mr. Childers asked me the question—he just turned it on two turns—I do not think it hardly would, a boiler of that description, but if the steam came on with a rush and made the gauge rush up—that is when they bring a strain on the boiler—that is how it explodes?

Q. There is no difference in steam, is there?

A. There is a difference in the way you put it in the boiler.

Q. Is there any difference in steam?

A. No, no more than when you get beyond a certain point, then there is difference in steam, when you bring your steam up too high.



Q. That is pretty explosive——

A. Yes.

Q. Steam may have water in it, may it not?

A. No, not necessarily; of course, it turns to water.

Q. Not necessarily? I did not say necessarily—I say it may have?

A. It turns to water of course, when it strikes the atmosphere—condenses.

Q. The difference between true steam and watery steam is considerable, is it not?

A. Wet steam is usually when there is too much water in the boiler and throwing it out with the steam.

Q. Now, do you know anything about their having been a stirring apparatus inside of this boiler?

A. No, I never saw it in my life.

Q. Well, if there was a stirring apparatus in this boiler, with a chain on the bottom of it, which was constantly circulating against the bottom of the boiler, whenever it was in use, and it had been so since the boiler was first made, would it make any difference in the resisting capacity of this boiler, in your opinion?

Mr. CHILDERS: I object to the question because it assumes  
375 a fact which is not in evidence—nothing about any chain on the stirring gear at all, ever since the boiler was in use.

Mr. FIELD: That is the difference of opinion between the gentleman and myself as to what the evidence shows.

The COURT: I am sure I could not say as to whether there was any evidence about a chain or not attached to this stirring gear.

After argument:

Mr. FIELD: I am not speaking about my own recollection: I do not remember the mention of a chain, but I do not suppose it is disputed that there was a chain—there was some kind of apparatus for the purpose of keeping the malt and so forth in motion.

The COURT: I will allow the question to be answered. If it turns out that there was no chain in evidence, I will modify it later.

A. No, not without it hit the side or the bottom of the boiler: I do not see what effect that would have on it.

Q. But, if it did hit the bottom of the boiler, would it have any effect?

A. If it was running on the bottom of the boiler all the time, it would wear the bottom out.

Q. Can you say that the bottom of this particular boiler was not worn out?

Mr. CHILDERS: I renew my objection.

376 A. I do not know: I never saw it.

Q. What would wear the bottom of the boiler out, if it was worn out?

A. I do not see what would wear the bottom of the boiler out—a boiler as I understand the description.

Q. Now, it would not be possible that there would be any more



steam in that boiler than the safety valve would resist, if it was put in in a careful way, would there?

A. No, if the safety valve was in proper working order, it should respond.

Q. Now, if the man who was working this boiler testified that immediately prior to the explosion the safety valve was in good working order, there was not exceeding six pounds of steam in the boiler, which had been put in slowly with this valve, the main valve, on the side, inch and a half valve, of two turns, and half inch valve at the bottom, open, and this explosion took place while he was seeking to close that lower valve and before the safety valve blew off, you would say that he had testified to the impossible, would you?

A. Well, if he put the steam in slow as he says, I should say it was impossible.

Q. You say it is impossible?

A. If he turned it in with a rush, I would say it is possible to do it, or if the gauge was not right or something, or he had not looked at it.

Q. And entirely without regard to the condition of that boiler, you would say that this man had testified to the impossible, when he said it exploded under the conditions I have pointed out to you?

A. Yes, if he had turned the steam on slowly, just two turns, as I understand it, I do not see how it would be possible.

Q. Can you say that the weight of the material in that boiler was not sufficient to break it?

A. No, I do not think it was, not with that weight of  
377 steel, three-eighths inch steel, I do not think it was. *it was.*

Q. Are you assuming that this boiler was three-eighths inch thick, on the bottom of the boiler?

A. I think that if the weight of the stuff—with six pounds of steam on—I do not think that six pounds of steam would make but very little difference and I do not think there would be much of an explosion.

Q. Who said there was much of an explosion?

A. I do not know. My understanding is that there was an explosion or running out, that is all I know.

Q. How much of an explosion would be necessary to open a crack in the bottom of that boiler a half inch wide at the widest place and extending about 18 inches around to a point near the well of the boiler?

A. Well, expansion and contraction may have done that.

Q. You mean without regard to the amount of steam?

A. No, if there was a crack in it, why, it could open itself up any time.

Q. Do you know what was the physical effect on this boiler itself of this alleged explosion?

A. No.

Q. Nobody has ever described to you what was done to the boiler?

A. No.

Q. And you think such a crack as I have described to you might have been created without an explosion?

A. Yes, cracks in boilers all the time, from just simply them giving away—do not explode—simply crack and leak.

Q. And that entirely without regard to the amount of pressure?

A. Yes.

Q. Does a boiler ever reach the stage, Mr. Isherwood, when it is not safe to put any steam in it — all, in your opinion?

378 A. Oh, yes; they are put in scrap every day for getting worn out.

Q. Now, will you describe to this jury just what condition the bottom of this hypothetical boiler will have to be in before, in your opinion as an expert boiler maker, it would be unsafe to put any steam in it at all?

A. Well, it would have to be very thin—then it would be safe enough to put some steam in—it all depends. You might put in 10 pounds of steam or it might hold 20 pounds, and not be suitable for the job it was for, but it would be a very hard question to answer when a boiler would be in such a condition that you could not put some steam in it.

Q. Now, is it not impossible for you to express an intelligent opinion as to the amount of steam that any boiler will carry without an inspection of the boiler; I mean an old boiler that has been used?

A. Well, I could not tell just how much, in my judgment, it would stand: I might be able to give an approximate idea.

Q. Well, your approximate idea would be a little better than a guess, would it?

A. Well, I could give an idea from the length of time it had been in service, and what it had been used for and the thickness of the iron—how thick the iron was—the steel originally.

Q. Well, now, is not the character of treatment which a boiler has received a very large factor in determining how long it will last?

A. Yes, it would depend a great deal on the water or any other substance that was kept in it.

Q. And also depend upon how it was taken care of by the man who was running it, would it not?

A. Well, if there was no fire under it an incompetent man would get along with it very well: If there was fire under it, it would depend largely on the man as to the condition you kept it in.

379 Q. Sudden changes of temperature are pretty trying on a boiler, are they not?

A. Yes, they are, to a certain extent.

Q. It makes a good deal of difference about how a boiler is handled, in that way?

A. Yes, a boiler exposed on one side to extreme cold and the other warm, it would have some effect in its expansion and contraction.

Q. And it is your opinion that such a crack as I have described to you in the bottom of this boiler and which was apparent there after this accident, might have been caused by expansion and contraction without any explosion at all?

A. Yes, it could be.

Redirect examination by Mr. CHILDERS:

Q. If this wheel, according to its weight, would answer for a pressure of only three and a quarter pounds when placed on the end of the lever attached to the safety valve, state whether or not there could have been six pounds of pressure on that boiler at the time of the explosion?

A. I do not think there could have been six pounds.

Recross-examination by Mr. FIELD:

Q. You mean to say that that wheel would only enable that safety valve to resist three and a quarter pounds of steam?

Mr. CHILDERS: I object to that.

A. There would be some friction of the lever itself in the joint where it worked—some little there.

Q. Are you undertaking to tell this jury from looking at this wheel, how much steam the safety valve would resist when this wheel was on it?

380 Mr. CHILDERS: I object to that question, because it is not what I was asking about.

Mr. FIELD: I want him to answer and say he is not.

A. No.

J. L. LADRIERE, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. What is your name?

A. J. L. LaDriere.

Q. What is your business?

A. Architect.

Q. I will ask you if you made a drawing of what is known as the brewing room at the brewery immediately after the second day of January, 1906?

A. Yes.

Q. When?

A. I could not tell the date exactly, but it was at the time the court was in session prior to this session.

Q. The term of court before this last one?

A. I was requested to go and measure the interior of this, while this case was coming up prior to this session.

Q. The last term of court, or last fall?

A. Last spring.

Q. I will ask you to look at the plat shown you and state whether or not that is the one you made?

A. Yes, sir.

Q. I will ask you to state upon what scale that drawing is made?

A. Three-quarters of an inch to the foot.

Q. Does it say so—I will ask you to give the dimensions, if you

can, of the room, of which you made the drawing and what  
381 you have marked "cooker—mess tank"?

A. Well, the interior—

The COURT: You better step over before the jury.  
(Counsel and the witness thereupon step over to the jury box.)

A. This is the entrance to the pump room—

Mr. FIELD: What is that marked?

A. Door.

Mr. FIELD: Between two heavy red lines?

Mr. CHILDERS: Door at the bottom of the plat?

A. Leading to the stair that passed by the brewing kettle.

Mr. FIELD: Does that mean the cooker?

A. No, sir; that is the brewing kettle. This is the plan of the stair and this the elevation of it—that stair rises to a platform where the brewing kettle sets, which is 7 feet high at the top—then the stair turns towards the cooker—here is the elevation of it—reaching the second floor—height of that stair is 11 feet: The ceiling height of that story is 11 feet—these steps that you see there—there is a space here between and an iron pipe railing to the cooker.

382 Mr. FIELD: The iron pipe railing is marked "Iron pipe railing."

Q. The dimensions of the cooker, you might give them—how high is the ceiling?

A. This ceiling, I did not take.

Q. What would you say it is?

Mr. FIELD: I object to any guess by the witness.

Mr. CHILDERS: He certainly ought to have a pretty good idea of it.

The COURT: I think that should be separated from the testimony about the sketch.

Q. Now give the dimensions of the cooker?

A. Well, that would scale four, nearly five feet.

Mr. FIELD: That is around?

A. Yes, five in diameter.

Q. And this is?

A. That is about 5 feet high. These things I was not requested to get absolutely correct inside. What I was asked to do was to get the relative position of them.

Mr. FIELD: Do I understand that the measurement of these things—that you were not asked to get them absolutely correct?

A. Yes, I would not want to say they are absolutely correct. The position is what I was aiming at exactly.

383 Q. What is the measurement of this approximately?

A. That would be eight feet.

Q. Is this round or square?

A. That is diameter.

Q. What is the altitude?

A. 6 or 7 feet.

Q. What is the distance between the bottom of the cooker and the mess tank?

A. That would be two feet.

Mr. FIELD: The larger circle is the mess tank and the smaller circle is the circumference of the cooker?

A. They are in that position—this one is not absolutely over the other.

Q. I will ask you how high is the ceiling—above the cooker—or what the distance from the ceiling—above the platform, or first floor—approximately, on which the cooker stands?

Mr. FIELD: I object to that unless the witness is qualified to tell.

A. I could not answer that; I did not measure it.

Q. I will ask you what your business is?

A. Architecture.

Cross-examined by Mr. FIELD:

Q. Mr. La Driere, are these two circles, down below, which you say represent the round of the cooker and the mess tank accurate?

A. You mean in circumference—I would not swear that they are absolutely accurate—it is pretty hard to measure a circular object without having proper instrument, so you can get the measurement correctly. The great stress that was put on me was to get the position of it.

Q. Can you tell me the cubical contents of that cooker?

A. I could if I measure it and figure it out.

Q. You could not from this plat?

A. No, sir.

The hour of 5:30 p. m. having arrived an adjournment was here taken until tomorrow morning at 9:30 a. m.

And now, on this November 13th, 1907, at 9:30 A. M., the hearing of this cause proceeds *in* pursuant to adjournment.

CHARLES Q. GOODMAN, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name?

A. Charles Q. Goodman.

Q. Where do you reside?

A. In Albuquerque.

Q. What is your business?

A. Bookkeeper.

Q. Have you any employment now, if so, what, with the defendant, the Southwestern Brewery & Ice Company?

A. I am bookkeeper for the company.

Q. Have you any checks which would show—have you any checks which were issued by that company to the plaintiff in this case?

A. Yes, sir.

Q. Produce them, please—I am only asking you for checks between the first day of January, 1906, and the 14th day of May, 1906?

385 A. Yes, I have them (witness handing papers to counsel).

Q. Were you in the employment of the company at the time these checks were issued—signed?

A. Yes.

Q. I will ask you to look at the signature to each of these checks and state whose signature that is on behalf of the company.

A. Henry Loeb's.

Q. What position did he hold with the company?

A. Secretary and Treasurer.

Mr. FIELD: I would like to see those checks.

(Mr. Field inspecting the papers.)

Q. Look at the signature of Joseph Schmitt or Joe Schmitt, that may be the way they have been signed, and state if you know that signature on the back of the checks—that is, in whose handwriting?

Mr. FIELD: I object to that unless he qualified himself.

The COURT: Sustained.

Q. Do you know the handwriting of Joseph Schmitt?

A. Why some are not Joe Schmitt's—

Q. Do you know the handwriting of Joseph Schmitt, not on the checks, but generally—have you knowledge sufficient to identify his signature, if you see it?

A. I have seen his writing.

Q. Are you sufficiently familiar with it to identify his signature if you see it?

386 Mr. FIELD: Object to that as a conclusion.

Q. Have you ever seen him write?

A. I have seen his writing, yes sir.

Mr. FIELD: I object to the answer of the witness and ask that it be stricken out because it is not responsive.

The COURT: The answer will be stricken out.

Mr. CHILDERS: I object to that on the ground that exception on the part of counsel should come from counsel who asked the question and not from counsel on the other side, if the answer is competent evidence in the case.

The COURT: I do not think it is competent for him to say he has seen his writing.

Q. Have you ever seen him write?

A. Yes, I have.

Q. Before or after this accident?

A. Before.

Q. Well, examine those checks if you can and have sufficient knowledge of his signature and say whether any of the endorsements on the back of Joe Schmitt or Joseph Schmitt were signed by him?

Mr. FIELD: I object to the question because no proper foundation has been laid for it.

The COURT: Overruled.

387 Mr. FIELD: Exception.

A. These are signed by Joe Schmitt.

Q. Those that you have selected out?

A. Yes, sir.

Mr. FIELD: Will you give me the dates?

Mr. CHILDERS: I am trying to get them in order.

A. March 12th, March 19th, March 26th, April 16th, April 23rd, April 30th and May 7th.

Mr. FIELD: Did you identify these?

Mr. CHILDERS: I guess they are sufficiently identified by the dates.

Q. Do you know what those checks were drawn for?

A. Wages.

Q. State whether or not Joseph Schmitt was engaged in actual work for the defendant at that time, at the time of the dates of those checks: look at them and see?

Mr. FIELD: It is not pretended but what he was by us.

A. These checks were issued at the time that he was not working.

388 Q. I will ask you to state, if you know when, first, his name was placed on the pay roll—if you know—if you have a pay roll to show—for actual work in 1906?

A. May 7th was the first check issued after his name was placed on the pay roll.

Q. You drew the checks up yourself?

A. Yes.

Q. As part of your duties?

A. Yes, sir.

Q. And they were signed by Mr. Henry Loeb—that check is there is it not, that May check?

A. Yes.

Q. Please pick that one out (witness hands check to counsel)?

A. That was drawn according to the pay roll as I understand it?

Q. Do you know what he had been doing during the week—was that drawn for a week or a month?

A. For a week.

Q. Do you know what he had been engaged in doing for the week ending May 7th, for which that check was drawn?

A. Previous to May 7th?

Q. Do you know what he had been doing for the week for which this check was drawn?

A. I do not know exactly what he was doing; he was engaged at the brewery.

Q. That is, you do not know what particular work he was doing—what is the date of that check?

A. May 7th.

Mr. CHILDERS: I will ask to have these checks identified—I will have them all identified.

Mr. FIELD: I do not make any question about them.

389 Mr. CHILDERS: I want them identified on the record.

Mr. FIELD: I will admit on the record that Joe Schmitt got the money for every one of those 19 weekly checks.

(Said checks are marked Defendant's exhibits 4 to 22, inclusive.)

Mr. FIELD: That is without admitting the competency of these checks, I admit that Joe Schmitt got the benefit of every one of them—got the money.

Q. Were you in the employment of the brewery company on the first day of January, 1906?

A. Yes, sir.

Q. Were all these checks drawn by you—including those that you identified a while ago?

A. Yes, sir.

Q. What are they all for?

A. Wages.

Q. State whether or not they were paid and returned to you through the bank?

A. Yes, sir.

Mr. CHILDERS: I offer them all in evidence, 19 checks.

Marked defendant's exhibits 4 to 22 inclusive.

Mr. FIELD: I object to the checks, because the fact they tend to establish is not competent in this case, and not because they do not prove it, if it is competent.

The COURT: That, of course, will have to be covered in the instructions to the jury. I will overrule the objection.

390

Mr. FIELD: Exception.

Q. They cover the full time for wages between what dates?

A. Between January 2nd and May 14th, 1906.

Q. I will ask you if you have any statement of the amount, or can testify as to the amount of money paid out by the defendant company on account of the physician's or surgeon's services, hospital fees and so forth, hospital and nurse's fees and other expenses connected with the injuries sustained by the *defendant*?

Mr. FIELD: That question can be answered yes or no.

A. Yes, sir.

Q. Have you the book showing those items?

A. I have a list of them—receipts.

Q. You have the vouchers and receipts?

A. Yes, sir.

Q. Produce them—have you a list you made based on the vouchers and receipts which you hold there in your hand?

A. Yes, sir.

Q. Will you produce that list?

A. Yes, this is it.

(Witness producing list referred to.)

Mr. FIELD: I would like to see it (examining list). I will admit on the record that you expended all of these items if you admit that this is all you expended, provided the fact is competent in this case.



If you will admit that this is all the expenses you paid so as to save me the necessity of cross examination, and showing that is all the expenses you paid, I will admit that you paid them.

Mr. CHILDERS: That is all we claim.

Mr. FIELD: Not all you claim, but all paid—if the fact is competent on the state of these pleadings, the plaintiff admits on the record that the defendant expended \$918—

Mr. MARRON: It is \$910.30, Mr. Field.

Mr. FIELD: \$910.30, on account of doctor's bills, hospital fees, nurse's fees, drugs and wages of this plaintiff between these periods about which the testimony had been given. I make the objection, of course, that on the state of the pleadings this proof is not admissible, but if admissible that the fact is true, the defendant admitting that it paid no other expenses of any character.

Mr. CHILDERS: There are four or five witnesses we thought we would need to prove the endorsements on the back of these checks and we will not need them now. They can be excused.

The COURT: It is admitted then subject to the objection.

Mr. FIELD: My contention is that on the state of the pleadings that they are not entitled to it.

392 Mr. CHILDERS: We want it admitted by the court, or excluded.

The COURT: I admit it, but I say the instructions to the jury will have to cover their effect.

Mr. CHILDERS: Then it is not necessary for us to offer evidence of the vouchers.

Mr. FIELD: I can see no necessity for the vouchers being put in.

Cross-examined by Mr. FIELD:

Q. Did you deliver these checks to Joe Schmitt?

A. Not all of them.

Q. Not all of them?

A. To the best of my recollection, the last month he was around at the office and got the checks himself.

Q. Well, before that did you deliver the checks?

A. I sometimes mailed them, but once or twice I recall giving them to his brother-in-law, I think, to deliver to him, Joe Schmitt.

Q. Well, did you deliver any one of them to Joe Schmitt?

A. On one occasion, I took a check to his house, that I remember.

Q. When was that?

A. I could not say the day: I had occasion to go to his house and his pay check was ready and I took it with me.

Q. That was at his own house?

A. Yes, sir.

Q. Then it must have been after the 28th of February?

393 A. Why, I am not certain whether he had left the hospital or not.

Q. Well, did you take a check to his house, or was he still at the hospital—you didn't deliver it to him, did you?

A. I delivered it to his wife.

Q. Don't you understand I am not asking about delivering it to his wife, but I am asking you about delivering it to Joe Schmitt?

A. I stated that I delivered some checks to Joe Schmitt the last month when he called at the office.

Q. With the exception of those, you have no recollection of having delivered any to him in person?

A. No, sir.

Mr. FIELD: That is all.

Redirect examination by Mr. CHILDERS:

Q. When you took that check to his house whom did you give that one to?

A. His wife.

Q. Could you tell by examination of those checks which one that was?

A. No, sir.

Q. Do you remember where he was at the time you delivered that check to his wife?

A. I do not remember whether he had left the hospital or not.

Q. You could not fix the date of that check?

A. No, sir.

Mr. CHILDERS: That is all.

Mr. CHILDERS: That is the case for the defendant at the present time.

394 Mr. FIELD: I will go on with my case in rebuttal with the understanding that I will be allowed to put Doctor Carns on when he comes. I want to lay the foundation for impeachment on matters that came to my knowledge this morning.

The COURT: Very well.

*Rebuttal.*

MATTHEW RIDLEY, recalled in rebuttal as a witness on behalf of the plaintiff, testified further as follows:

Direct examination by Mr. FIELD:

Q. Mr. Ridley, did you tell Henry Loeb at the time you went to the brewery to take the measurement for a new bottom of that cooker that that cooker would last or that he could use it until you could get the material and fix it, or any words of that import?

Mr. CHILDERS: Objected to, because he was asked that when he was on the stand before and he denied it.

Mr. FIELD: The court struck it out on the ground that it was not proper cross examination.

Mr. CHILDERS: That is the only objection I have to it.

Mr. FIELD: I have had the record carefully examined.

395 Mr. CHILDERS: If that is the fact, I have nothing more to say.

The COURT: I think he did answer it and I struck it out. Objection overruled.

Q. Answer the question?

A. No, because I did not know how long it was going to be.

Mr. CHILDERS: I object to his reasons.

The COURT: Just leave the NO in and the rest of it was not responsive and can go out.

Mr. CHILDERS: I withdraw the objection, because I want to cross examine him.

The COURT: The objection is withdrawn, the jury can consider the whole answer he gave.

Q. How long have you been a boiler maker Mr. Ridley?

A. Oh, it is 46 years since my father put me into a boiler shop.

Q. Have you been working at the trade ever since?

A. Yes, sir.

Q. State, Mr. Ridley, whether or not you went to the brewery after this accident at the instance of the brewery company to examine this cooker?

A. What was that?

Q. (Repeated.)

A. Yes, I was requested by Jake Loeb to go up there.

396 Q. Did you examine it?

A. I looked it over.

Q. From your experience as a boiler maker are you able to state whether or not the condition in which you found that cooker after the accident could have been produced by a pressure not exceeding six pounds of steam

Mr. CHILDERS: Object to the question as leading.

The COURT: Overruled.

Mr. CHILDERS: Exception. I make it a further objection on the ground that the conditions are not stated to the witness in the question put to him.

The COURT: Overruled.

Mr. CHILDERS: I save an exception.

A. No, I would not say that it was safe under any pressure at all.

The COURT: That was not the question I think.

Mr. FIELD: No, sir; still I would like to have that answered.

The COURT: I think then, you should ask him a question as to that. He has not answered the one you did ask him.

Q. (Repeated.)

A. Yes, sir; I believe it would occur not exceeding six  
397 pounds—that accident would occur not exceeding six pounds.

Q. State, Mr. Ridley, from your experience as a boiler maker, whether or not in your opinion, that cooker could have been safely used under a pressure of ten pounds at the time you took the measurement for the new bottom?

A. No, sir; no pressure at all; it was not safe under any pressure at all when I examined it for the new bottom.

Cross-examined by Mr. CHILDERS:

Q. Did you tell them so when you examined it?

A. Sir?

Q. Did you tell them that when you examined it?

A. No, sir.

Q. Why didn't you tell them so?

A. Because, I was not aware they had any pressure in the thing at all.

Q. You knew it was a boiler didn't you?

A. Sir?

Q. You knew that it was a boiler you were examining and not a tea kettle

A. I knew it was some kind of a boiler or mash tub, but did not know that there was any pressure in that.

Q. You went up there and examined that thing and didn't know that it was used to confine steam in it?

A. Well, I did not know what they used it for—I did not know what they were using it for—they had some kind of mash in there—I did not know that—I did not know that they had any pressure in there—I had repaired a mash tub down below that was open on the top and I thought it was something like that—that didn't have any pressure on.

Q. Did you ever examine a cooker used in any similar use in brewing process before?

398 A. No.

Q. Did you examine the whole cooker or just the bottom?

A. Just the bottom of it.

Q. Didn't you go inside of it.

A. I went inside of it and looked all around it.

Q. How did you get inside of it?

A. Went in the man hole on the top.

Q. When you went inside of that cooker through the man hole on the top, didn't you see a steam gauge there and a safety valve and pipes?

A. No, sir; I didn't notice anything of the kind.

Q. Didn't you see any pipes on the side of that cooker and coming up from the bottom and see that they were steam pipes?

A. No, sir; I didn't notice any pipes—I have already told you that; I didn't know that there was any pressure in the thing at all. I do not understand the brewing process.

Q. But you do understand the steam process don't you?

A. Yes, sir.

Q. You know a steam pipe from any other kind of pipe?

A. You bet.

Q. You know a steam valve from a gas jet, don't you?

A. Yes, sir.

Q. And yet you say you examined the bottom of that cooker and you didn't know that there was any pipe that opened into it through the bottom or conveying steam into it?

A. I am telling you—let me say a word—it was in such poor condition and had given such warning before that no one would have

thought there was any steam pressure in there—it had given warning before so that holes were stopped with bolts around——

Q. I am not asking you that now——

399 Mr. CHILDERS: I move to strike that out.

The COURT: I think the witness is entitled to give that as a fair explanation.

Mr. CHILDERS: I think I am entitled to a fair explanation before he makes his speech.

The COURT: What do you say, Mr. Field: I do not want to leave it in against your objection.

Mr. FIELD: Your honor has not heard me make any objection.

The COURT: I will strike it out.

Mr. FIELD: I except to the action of the court in striking out that answer.

The COURT: The jury will not consider that answer, because it was not responsive to that *answer*.

Q. The question I put to you was whether you observed or could have observed that there was a steam pipe with a steam valve—with a valve for letting in steam, passing through the bottom of that cooker—when you examined it—did you or not?

A. That might be.

Q. Did you or not observe such a fact?

400 A. That might be and not be no pressure in there—You might have steam without pressure.

Q. That is not the question: did you observe such fact?

A. Well, yes; I might observe a thing like that—yes.

Q. What did you suppose that that pipe was used for unless it was for putting steam into that cooker?

A. Well, I would not suppose it was for anything else—either for putting steam or water into the cooker.

Q. Was anything said to you by either one of the Loebes, either Jake Loeb or Henry Loeb about their being anxious to have that thing fixed?

A. Oh, yes.

Q. And in a hurry for it?

A. Yes, they were anxious to have it fixed, yes, sir.

Q. Why?

A. They were anxious to have it fixed, of course.

Q. Why?

A. To keep on with their work.

Q. And you went there and examined that thing and found it in condition that it would not stand any pressure and observe steam pipes opening into it and didn't tell them that it was dangerous to use it: is that the fact or not?

A. I say that——

Q. Is that the fact or not?

A. It was not fit for any pressure.

Q. I did not ask you that question: you went there and examined it, saw steam pipes opening into it and you saw pipes which you knew connected with the boiler in the engine room, didn't you: didn't you see those pipes.

A. Yes, of course, I saw the pipes.

Q. Well, didn't you suppose that those pipes were used to  
401 convey steam from the boiler room to this cooker?

A. Well, yes; that might all be.

Q. And you were sent there for the purpose of making an examination of this cooker and the bottom of it—was your examination confined to the bottom of the cooker?

A. Well, yes——

Q. Why?

A. The bottom of it was——only the bottom of it was named, because there had been leakage there.

Q. Who told you to go there and examine that cooker: From whom did you receive your instructions?

A. The Albuquerque Foundry sent me there.

Q. The Albuquerque Foundry talks through somebody, doesn't it?

A. The Albuquerque Foundry what?

Q. Has to speak through somebody: who was the person that gave you your instructions to go up and examine that cooker?

A. Who was the person?

Q. Yes?

A. I could not say now.

Q. Was it Mr. Hall?

A. No, Mr. Hall would not be there.

Q. Was it Mr. Ray?

A. I could not tell which of these gentlemen it would be. I do not know whether it was Mr. Ray or Mr. Brice.

Q. What were you told to do when you were sent up there?

A. I was sent up there to look at this tank or cooker, or whatever it was, this thing; what was wanted to be doing.

Q. Were you able to go up there and look at the bottom of it and shut your eyes as to the balance of it?

402 A. The bottom of it was the only thing that was named about it—look at the bottom of this cooker.

Q. When you received your instructions you were told to go up there and look at the bottom of the cooker, were you?

A. Well, I do not remember whether I was told to look at the bottom of it, or told to go up there and look at the cooker anyhow.

Q. And when you went there, you found it in such a condition that it would have not sustained any pressure?

A. No, it was not safe under any pressure—I did not understand the brewery process.

Q. You understand pressure, don't you?

A. Yes, sir.

Q. Wouldn't have sustained any weight—without any pressure, of 1900 pounds for instance and 19 barrels of water added to the 1900 pounds; would it have sustained that without pressure?

A. Well, it might hold that without pressure, but yet would not have pressure.

Q. It might?

A. Yes.

Q. You are doubtful about that?

A. Yes, sir.

Q. And you were doubtful about it when you went up there and looked at it: you were doubtful about whether it would ever stand that amount of weight when you were up, were you not?

A. Well, no, I do not know that I was doubtful about the safety of it, provided there was no pressure.

Q. Did you ask anybody about how that cooker was used when you were there?

A. No, sir; no, I did not.

Q. As to what use it was to be put to or how much weight it had to sustain?

A. No, I did not.

403 Q. Or as to whether there was any pressure to be used through those steam pipes?

A. I did not ask any questions about pressure, because I had no idea there was pressure: never thought of such a thing.

Q. You told them nothing after you got through with it, did you? What did you say after you got through with your examination?

A. I told them that it needed a new bottom that is all.

Q. That is all that you did say?

A. Henry Loeb's says, it needs a new bottom you think, and I says, yes, sir.

Q. You never told him what the urgency was for a new bottom?

A. No, I did not.

Q. You never told him it was unsafe to use it?

A. No, I didn't say that it is unsafe to use it—but without pressure.

Q. You didn't tell him—you said a while ago that it might be used until the material could be had to repair it, to make a new bottom?

A. Well, I could not say: I could not say that it would last until the material came, because I did not know how long it would be.

Q. Now is that the only reason that you have for saying that you didn't tell him that, that you didn't know how long it would take to get the material?

A. No, sir.

Q. Or do you remember that you didn't say anything of the kind?

A. Well, I did not—what was your last question?

Q. I can put the question again?

The COURT: Let us see what he says to that.

Q. (Repeated.)

A. (After a pause.)

404 The COURT: Can you answer that, Mr. Ridley, whether you remember that you didn't say anything of the kind?

A. No—I do not know—that I—(after a pause) I do not remember that—I do not remember saying that this thing would last until it was fixed: I do not remember saying any such a thing as that.

Q. Now, you stated in your direct examination that you didn't say

it, because you could not tell when the material would be here to fix it, or when it could be fixed: now, is that the reason that you say that you do not remember of saying such a thing, or is it a fact: are you positive that you didn't say any such a thing as that independently of the fact that you could not tell when the material would come?

A. Well, I do not remember saying such a thing to Henry Loeb that it would last until the material—until it was fixed.

Q. Do you, at the present time, remember that you didn't say any such a thing to him; yes, or no?

A. I do not remember saying a thing of that kind.

Q. That is not the question that I put to you: the question I put to you is, can you at the present time remember that you didn't say any such a thing to him?

A. Well, I say I do not remember saying a thing of that kind.

Q. Have you any recollection about it at all as to what you said—any present recollection?

A. Well, I believe I have given all the particulars that I know about it.

Mr. CHILDERS: That is all.

Redirect examination by Mr. FIELD:

405 Q. You do remember well what took place when you were up there?

Mr. CHILDERS: Objected to as leading and improper re-direct.  
The COURT: Sustained.

Q. State whether or not you remember what took place while you were there?

A. Yes, I remember pretty well what I said when I was there.

Mr. FIELD: That is all.

Mr. FIELD: I wish to recall Dr. Carns now. The records will show that Dr. Carns was recalled for further cross examination.

D. H. CARNS, recalled for further cross examination, said witness having been heretofore introduced on behalf of the defendant.

Cross-examination by Mr. FIELD:

Q. Doctor, did you give an interview to a reporter of the Evening Citizen with reference to this accident, Joe Schmitt, on the day that it happened?

A. No, sir.

Q. Did you read a story with reference to this accident in the Evening Citizen?

A. No, sir.

Q. Wait a moment, I had not finished—published in the Evening Citizen of January 2nd, the day of this accident, purporting  
406 to state the facts with relation to the condition of this man, as coming from the Doctor in charge of the case?

A. When you asked that question first, I thought you had refer-



ence to some recent one—I may have done that, I do not remember that.

Q. I don't want to read here this article to the jury, Doctor, until the court has stated it is proper and consequently I want you to come down here and read it yourself and tell me whether or not you gave that interview?

A. (Witness reading article referred to:) No, sir, I never gave that interview.

Q. Did you talk to the reporter of the Evening Citizen about this accident on the day on which it occurred?

A. I may have done so; he comes up there frequently to learn if there is anything new, but I do not recollect of doing so. It has been my custom to not give anything of that sort where I am in attendance to any reporter.

Q. Well, you have no recollection about that interview at all?

A. I have not.

Q. Do you know Mr. W. N. Beal?

A. Yes, sir.

Q. Did you, on the 6th day of January, 1906, exhibit to him the cast of Joe Schmitt's hands?

A. I may have done so. I showed it to quite a few persons. I may have done so; I probably did, but I do not remember.

Q. Did you, on that occasion, have a conversation with Mr. Beal in relation to Mr. Schmitt substantially as follows: That Mr. Beal, when he looked—

Mr. CHILDERS: When and where?

Q. At your office in Albuquerque on the 6th day of January, 1906, with Mr. W. N. Beal, reporter for the Citizen: Did you exhibit to Mr. Beal this cast and describe this man's condition—the description I cannot give you and do not consider it material for my purpose—and did Mr. Beal reply that this man's suffering must have been something terrible and did you reply to that, that he didn't know anything about suffering, because he was unconscious, or under the influence of morphine all the time, or in words of like import?

A. I never remember of having any conversation of that sort with Mr. Beal: Could not have, because he was not unconscious and I would not have said it.

Q. You deny, then, categorically, that you told Mr. Beal at the time and place stated, either that this man was not conscious of his suffering, because he was unconscious or under the influence of morphine?

A. Yes, sir.

Mr. FIELD: That is all.

Mr. CHILDERS: No questions.

*Rebuttal Resumed.*

JOSEPH SCHMITT, the plaintiff recalled as a witness in his own behalf, testified further as follows:

Direct examination by Mr. FIELD:

Q. Did you hear the testimony of Mr. Marron?

A. Yes, sir.

Q. State whether or not you saw Mr. Marron and Mr. Jake Loeb at the hospital on the 6th day of January, 1906, as described by Mr. Marron?

A. No, sir; I did not.

Q. State whether or not you on that day or on any other day ever authorized Mr. Marron to sign your name to this paper which was offered in evidence here, called a release (defendant's exhibit 3)?

A. No, sir; I know nothing about it.

Q. State when you first saw that paper?

A. I seen that in your office.

Q. This paper?

A. You read it in front of me, yes.

Q. When did you first see this paper which I hold in my hand?

Mr. MARRON: He answered it.

A. This, you hold in your hand, I do not know if I ever seen it. I do not know if it is this or a copy of it you had in your office. That is all I know about it.

Q. Do you know Alice Garcia?

A. No, sir.

Q. Do you know Mrs. J. W. Prestel?

A. No, sir.

Q. Did you ever see either one of those persons, to your knowledge?

A. No.

Q. You heard the testimony of Dr. Carns?

A. Yes, sir.

Q. State whether or not you ever told Dr. Carns on the 7th day of January, 1906, at the hospital, that the day before you had made a settlement with the brewery and that you were satisfied with the settlement, and that all you wanted was to be allowed to keep your job at the brewery and be paid your wages, or anything of like import?

A. Not if I know anything about it.

Q. Well, that is not an answer, Mr. Schmitt: Did you make such a statement to Dr. Carns at the time stated or any statement of that kind?

A. Not to my knowledge.

Q. Did you have a conversation with Dr. Carns at his office in which you told him that your hands, your fingers, were crooked before the accident, just as they were after the accident, or anything of like import?

A. No, if I can explain myself a little more——

Q. Yes——

A. About my fingers—that was the only question—he wanted to cut these two little fingers off—cut them off entirely—remove them—he said that them fingers, they will be stiff and always in your road, when you are working—that is what he said.

Q. And what did you say in reply to that?

A. I said, you won't cut on my fingers. I said I suffered enough of it already.

Q. Did you have a conversation with Dr. Carns in the office of Mr. Ackerman about two months ago?

A. Yes, sir.

Q. Tell the jury what took place at that conversation?

A. I came up to Ackerman's office supposing to pay my \$10 for the house rent—you might say—and when I came in Dr. Carns was sitting in there—he had his feet up this way (indicating), as soon as he seen me he asked me how I was—how my hands—I told him that they are pretty bad yet—I set right next to Mr. Ackerman and he wrote out my receipt—a while he said your case going to be on hand pretty soon now, he says, I be over there too——

A JUROR: Who says that?

Mr. FIELD: Who said it?

A. I says yes—Mr. Carns—then he reply, the only way they want to hold you now is that release what they have got; well then I replied they can throw that paper down on the window—I do not know nothing about it and never seen Mr. Carns since. I  
410 went out. That is all I was talking to him and never talked to him since.

Q. Did you ever in any conversation that you had with Dr. Carns tell him that you had the best lawyer in town and you were going to beat the brewery company or anything to that effect?

Mr. CHILDERS: Objected to as immaterial.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. No, sir.

Q. Did you have a conversation with Dr. Carns at your sister's house, at which were present Dr. Carns, Tom Milet, your sister Mrs. With and your brother, in which you told Dr. Carns that your little finger was always crooked and that that was hereditary in the family; that all the children had it?

A. Yes, sir; we had a conversation, but not quite the way he explain it. In the first place my sister was never in there when the doctor was there—when the doctor come she always went out, because he is talking such bad language——

Q. Never mind about that; now, go on and tell what took place there when the doctor was there?

A. Well, it was—it started that way—that the nurse asked him about them little fingers—them little fingers, they are so he can hardly put the bandage on—and they commenced talking, and he said I had trouble with it at the hospital when I had them on splints—well, then I didn't said anything—then he commenced—

I wish I could take your fingers off for you—they are in your road—and I told him I never had any trouble with them before and they won't bother me afterwards either—I do not  
411 think so—he says, well they look a little terrible—I said well, I never had any trouble with them—I says this finger was a little crooked, but they never did bother me before and that was about all that I know about that conversation.

Q. After Dr. Carns went away did your sister come into the room?

A. Yes, sir.

Q. Was anything said at that time about what would happen in court with reference to that little finger of yours?

A. Not that I can remember of.

Q. Did your sister say that you ought not to have told that, because that would be the first thing that would be brought up in court?

A. I cannot remember: I was not straight in my head, yet, at that time.

Q. Well, you heard the testimony of Tom Milet yesterday, didn't you?

A. I did.

Q. Did you ever have such a conversation or hear such a conversation as he detailed here on the witness stand here yesterday?

A. Well, that is all what we was talking about.

Mr. CHILDERS: I do not think that that question should be asked and answered that way. I think the whole examination is leading, but I have not objected to it in the interest of time, but I object now.

After argument:

The COURT: The records show what the testimony was. I suppose you would have to put it more specifically. I think the testimony was brief and covered only a small field.

412 Mr. FIELD: Do I understand your honor sustains the objection?

The COURT: Yes, if they want it more specific.

Q. Tom Milet testified yesterday that after Dr. Carns left there on the occasion to which I have directed your attention, your sister, Mrs. With, came into the room and said, Joe, why did you tell the Doctor about your little finger—that is one of the first things that will be brought up against you in court, or something of that kind; now, state if your sister said anything of that kind?

A. Not, if I remember it.

Q. Did you ever have any conversation with Dr. Carns in which — was mentioned?

A. No, sir.

Q. When did you first know Mr. Schmitt that it was claimed by the defendant in this case that you had executed a release of this cause of action?

A. I cannot answer that, Mr. Field. You will have to explain that a little.

The COURT: The stenographer will read the question.

Q. (Repeated.)

A. There is a word in there, I cannot take the expression—what it means.

Q. What is that?

A. I do not know, you will have to repeat it. I heard that when I handle Jake Loebs the papers over——

Q. Do you mean a paper in connection with this case?

A. The paper, you gave it to me.

Q. Well, what was that paper?

A. I think it was the affidavit—I suppose it should be.

Q. Do you know when it was that you handed that paper to Jake Loebs?

413 A. That was about on the 2nd or 3rd of April, I think it was.

The COURT: Of this year?

Mr. FIELD: No, last year.

A. 1906.

Q. That paper bears date the 30th of March, 1906?

A. Might be that time: I do not know.

Q. When you handed that paper to Jake Loebs did he say anything?

A. Well, he would see what was in it. He wants to read it over and he let me know. And he never told me anything about it—he never talk about it any more afterwards either.

Q. When was it that you learned that it was claimed that there was a release?

A. When I first heard it?

Q. Yes?

A. I think Mr. With was with me up at Mr. Marron's office.

Q. What time was that with reference to the time when you handed Jake Loebs this paper?

A. Might been a couple of weeks—a couple of days afterwards.

Q. What, if anything, did you do in consequence of what you heard about that release at the time, at Mr. Marron's office?

A. Well, Mr. With and I went over there and seen about a settlement.

Q. Well, never mind about what passed with reference to the settlement: you say at that time you heard it was claimed that they had a release from you?

A. Yes, sir.

414 Q. Did you or not ever ask Mr. Marron to show you the release or to give you a copy of it?

A. Well, now—I did not at that time—I asked him—if I would like to see it—I guess Mr. With will state the same thing—I never believed there was any made, because I did not know anything about it.

Q. Well, now, did you ever go to Mr. Marron's office and ask him to show you that release or give you a copy of it by my instructions?

A. Yes, sir.

Q. When was that?

A. I do not know when—I do not know which month it was.

Q. Was it before or after the answer of the defendant was filed in this case?

A. It was before.

Q. Now, after this answer was filed and a copy of this release attached to it, what, if anything, did you do towards offering to pay back to the brewery company anything that they might have paid out on your account?

Mr. CHILDERS: Is that offering in writing: I understand it was.

Mr. FIELD: No, it was not—this offer I propose to prove was a verbal offer.

A. About that offer that was made to me?

Q. No: What did you offer to do towards paying back this money?

A. Yes,—I have got—I asked Mr. Jake Loeb on the brew house I want to pay him back all the expense what he had and he stood there and looked that way (witness rising in chair and indicating) walked off and never said a word. The next day I was making part of the brew—I could not brew yet and Kelly come—he  
415 was employed at that time in the brewery—and I told him—

Mr. CHILDERS: I object to that, I do not think his conversation with Mr. Kelly, an employé of the brewery, without showing his capacity, is binding on this defendant.

A. He says he was vice-President, was he not?

The COURT: I do not think we are acquainted with Mr. Kelly yet—his connection has not been shown.

Mr. FIELD: It has never been shown until now. I am informed that I can bring Mr. Kelly here and prove that at his instance he went to Jake Loeb and asked him about this.

The COURT: That Kelly went to Loeb?

Mr. FIELD: Yes, sir.

Mr. CHILDERS: Then Kelly is the person to testify.

After discussion:

Q. You say Mr. Kelly was an employé of the brewery company?

A. Yes, sir.

Q. In what capacity?

A. As far as I know, he was vice-president and traveling man for the brewery, and collector.

Mr. CHILDERS: I object to that testimony that he was  
416 vice-president. I will withdraw the objection, we can prove that he was not.

Q. Now, what did you say to Mr. Kelly about this?

A. I told him, will you please tell Jake Loeb, I want—to give you the bill, how much I owe him for all the expenses what they paid out for me: what they paid out for me, and lets see—I told him yesterday already and he walked off and didn't state anything about it.

Mr. CHILDERS: I object to the conversation and move to strike it out.

The COURT: I will leave it in.

Mr. CHILDERS: I will save an exception.

Q. Did you see Jake Loeb afterwards?

A. Yes, sir.

Q. What, if anything, did he say about this offer to pay back the money?

A. He said nothing, only he says, I am going to stay Field—I am going to fight Field—that is what he meant anyway.

The COURT: What did he say first?

Mr. FIELD: I am going to stay Field.

Q. State whether or not you ever authorized Mr. Field to make a proposition in writing to the brewery company to pay them back what they had paid out?

A. No, only I have got a letter from Mr. Field—I should ask Mr. Loeb—and I guess the brewery company has got the letter the same time.

Q. Did you understand the question?

A. No, I do not think I do.

Q. Did you ever authorize Mr. Field to offer to pay back to the brewery company, what you had—what they had paid out for you?

A. Yes—I was willing—I asked you if this is proper.

Q. State whether or not at the time the letter was presented by me to the brewery company a copy of it was presented to you?

A. Yes, sir.

Mr. CHILDERS: If you have a copy of the letter we won't take up time. We will admit that a letter was sent to the brewery company.

Mr. FIELD: I have a copy.

Mr. CHILDERS: You can use that copy as an original.

Mr. FIELD: It is admitted that this is a copy of a letter which was sent to the brewery company and received by the brewery company and I offer it in evidence.

Mr. CHILDERS: To which we have no objection.

Paper marked Plaintiff's Exhibit D, and which is read to the jury.

Mr. FIELD: And it is admitted that this paper is the answer to that letter to the brewery company, and I offer this in evidence.

Paper marked Plaintiff's Exhibit E, which is read to the jury.

Q. Mr. Schmitt, state whether or not you know how you were taken away from the brewery after the accident that morning or where you were taken?

A. No, sir; I cannot tell, because I was not—suffering too bad and I cannot remember anything at all, whatever, and I do not know how I got out of that brew house myself alone.

Q. State whether or not at the time that you put a patch on that cooker, you told Henry Loeb that the cooker was good for another year?

A. There was no such a conversation whatever.

Q. When did you first call Henry Loeb's attention to the leaking cooker?

A. I think it was in June, May or June, something like that.

Q. Now, when was it that you put the first patch on it?

A. I think it was in August.

Mr. CHILDERS: He fixed that date before.

Mr. FIELD: I think he did.

Q. Was that before or after Mr. Ridley came to look—when did you put the second patch on?

A. After.

Q. Now, wait a minute: what date did you put the second patch on the cooker?

A. It was about a couple of weeks before the accident was—before the accident happened.

419 Q. And the last patch was put on after Mr. Ridley was there?

A. Yes, sir.

Q. Were you or not present and in the cooker with Henry Loeb and Mr. Ridley when the measure was taken for the new bottom?

A. Yes, sir; I was in with them.

Q. Did Mr. Ridley at that time say to Henry Loeb that the cooker would last until the material would come to fix it, or anything of that sort?

A. There was no conversation like that—after the measure was taken, Mr. Henry Loeb reached a stick in for us to take the measure and he looked in there the same time, I guess—you will remember yet, that, Henry, won't you?

Q. Now, I ask you whether or not on that occasion, Mr. Loeb—Mr. Ridley told Mr. Loeb that that cooker would last until the material would come to fix it, or anything like that?

A. No, sir; there was no such a talk about it, because Mr. Loeb—

Q. Was anything said on that occasion about using the cooker a few couple of times, or a couple of times?

A. There was no such a talk about it. Mr. Loeb went away after he reached in the stick and he looked in, and before he went away there, he says to me—watch out and watch if this ladder so it won't slip, or else that man fall down and hurt himself; that is what he told me—I was the last one out of the tank.

Q. While you were at your sister's house in charge of Tom Milet as nurse, state whether or not the nurse fastened you in bed at any time?

Mr. CHILDERS: I object to that as immaterial and irrelevant.

The COURT: Overruled.

420

Mr. CHILDERS: Exception.

A. Yes, sir; he fastened me in the bed about one or two days after I arrived at my sister's house. He strapped me down, first this way, hands down and afterwards this way (indicating).

Q. For how long were you kept strapped in bed after you got to your sister's house?

A. About a week before I left my sister's house and got permission to go home.



Q. I will repeat that question. Mr. Schmitt: I do not understand your answer?

A. About a week after the doctor gave me permission to go home.

The COURT: He answered your previous question—he told when it began and now tells when it ended—he has not said it was continuous.

Q. Do I understand that it ended about a week before you went to your—

A. Yes, sir.

MR. FIELD: I do not think of anything else now. I will have to ask your honor to indulge me if I do think of anything else material.

The COURT: I suppose you will not be very sharp with each other about that.

Cross-examination by Mr. CHILDERS:

Q. You say you were fastened in bed about two days after you left the hospital up to about a week before you left your sister's house? Is that right?

A. Yes, sir.

421 Q. You were kept fastened in bed all the time?

A. Over nights.

Q. In the day time you weren't fastened in the bed?

A. No, sir; because the nurse watched me all the time. He was with me all the time.

Q. Every night during that period you were fastened in the bed?

A. Yes, sir.

Q. How were you fastened, by what means?

A. They strapped me down to the bed so that I could not get at my hands—because I did not know what I was doing.

Q. Did you know what you were doing in the day time?

A. Well, sometimes and sometimes not—you can ask the nurse.

Q. I am asking you now: When the nurse is here, I will ask him: you did not know what you were doing in the day time or night time either, did you?

A. Well, in day times, I know lots of it—you remember at night time a sick person is worse than at daytime, that is one sure thing.

Q. When you are asleep you do not know what you are doing—unless you are dreaming, do you?

A. If I would have been asleep they would not have needed to strap me down, that is one sure thing.

Q. Is it not a fact that you were strapped down for the purpose of keeping you from scratching your hands or your face?

A. Yes, sir.

Q. That was the purpose of it, was it not?

A. Yes, sir.

Q. And that in your sleep it would itch and you might scratch yourself?

A. Sure thing.

Q. That was the reason for it, was it not?

A. Well, sure thing, that was the reason for it.

422 Q. Just describe exactly how you were strapped down: where they put the straps and what kind of straps they were?

A. It was straps from the satchel.

Q. Leather straps taken off the satchel.

A. Yes.

Q. How were the straps fastened; what part of your body; how did they fasten them?

A. Fastened me on the hands—tied me down.

Q. Strapped your hands down?

A. Yes, sir.

Q. That was all, was it not?

A. To prevent me from getting at it, so I could not reach it with my mouth.

Q. Now, you say Dr. Carns wanted to cut off your two little fingers?

A. Yes, sir.

Q. You are positive about that; now, when did he tell you that he wanted to cut them off?

A. At my sister's house first and then up at his office—every time he came up—when he put the bandage on—every time.

Q. I understand you to say that you do not remember anything that took place up to the time that you left your sister's house, is that right?

A. I did not say that, I do not think.

Mr. FIELD: I do not think so either.

Q. When did you commence to remember what took place?

A. I cannot answer that question.

The COURT: When did you begin to remember what took place?

Mr. FIELD: If he asks when he began to know, he might answer that.

423 The COURT: Put it that way then.

Mr. CHILDERS: I think I put it in good English.

A. Then, if I do not understand it—I think I am entitled to an interpreter too, being I do not understand your question.

Mr. CHILDERS: I was not addressing that last remark to the witness.

Q. (Repeated).

A. That I cannot exactly say when it was; I cannot remember it because I had trouble with my hands for three or four months afterwards, yet.

Q. You did not know anything for three or four months afterwards?

A. I have the proof for it, too—Mr. Dr. Hope examined my eyes—

Mr. CHILDERS: I move to strike that out—

A. If you want to prove that bring him here.

Q. Yet, you have come here and testified to a whole lot of things that occurred during that time?

A. What is that?

Q. Yet you have come here and testified to a whole lot of things that took place during that time?

A. What I testified is the whole truth.

Q. Yet you say you were not at yourself and not certain as to what occurred for three or four months?

A. What is that?

Q. Now, you come here and tell the jury and say you do not know what took place for three or four months?

424 A. I did not say I did not know something—I know something—I know something what I heard, and what I was talking about it.

Q. Do you know what you were doing when you signed your name on the back of those checks in April and March, 1906, and got the money on them; do you know what you were doing then?

A. Well, because I needed the money to support my family—I got crippled up in the brewery didn't I?

Q. You knew in April—March, and up to the 7th of May that you were not engaged in working at the brewery, didn't you?

A. No, sir; I was not working for the brewery.

Q. You knew that; you remember that, do you; you remember that, you knew it then and remember it now?

A. Well, I remember it, sure; I don't want to work for them before June.

Q. What did you suppose that the brewing company was paying you for if you were not working for them unless it was on account of this release and in accordance with the terms of it?

A. Because it was no more than right to pay for it.

Q. And all the time you were taking the pay and signing these checks you didn't know anything about this release?

A. Not before Jake Loeb told me about it.

Q. Not before he told you about it?

A. Yes, sir.

Q. The date of that affidavit—you delivered that affidavit—I thought a while ago that you said the first you ever knew of the release was when Mr. Marron told you in his office; didn't you tell that?

A. I said when I handed that paper over to Jake Loeb.

Q. What did he say to you then?

A. He didn't say anything at all, if I can remember—anything important.

Q. Didn't you tell us just a few minutes ago in your direct examination in answer to a question by Mr. Field, that the first  
425 time you ever heard of the release was when you were in Mr. Marron's office with your brother-in-law With?

A. That was afterwards, yes, sir.

Q. Is it not the fact that was the first time you ever heard of it?

A. That is the fact—yes, sir—that is what I heard when I gave this paper to Mr. Loeb.

Q. Did you say on your direct examination that Mr. Loeb said anything to you about the release?

A. Well—I cannot remember.

Q. You cannot remember what was stated a few minutes ago; you are not at yourself yet, are you?

A. Sometimes not, I guess—you know that yourself.

Q. How do I know it?

A. Because I cannot answer some of your questions you bring before me.

Q. Because you cannot understand some of my questions?

A. No, I have not the least idea of it.

Q. When you fail to understand one of them, you say so—and you have said so, have you not, and the questions have been explained to you whenever you asked for any explanation, is not that the fact?

A. Not answered.

Q. Is not that the fact?

A. (After a pause) I do not know.

Q. Now, if Mr. Loeb told you something about the release—did he when you gave him that affidavit?

A. Let me see—I seen him when I gave him this (referring to release). I think it was 12 o'clock in the afternoon—and he went home.

MR. FIELD: The witness used the word "release"; he certainly did not mean to use the word "release"; I suppose counsel will give him a chance to correct that.

426 A. I did not know at that time what release means.

Q. You mean when you gave Loeb the paper which Mr. Field had given to you—the affidavit you mean—that is what you meant, was it not—Mr. Field gave you an affidavit?

A. Yes, sir.

Q. Which you took and delivered to Mr. Jake Loeb?

A. Yes, sir.

Q. Did you take that and deliver it to Mr. Loeb about the same day that you swore to it—you signed it and swore to it?

A. I think it was.

Q. The same day?

A. It was 12 o'clock, I know.

Q. If this is dated the 30th day of March, 1906, you gave that paper to Mr. Loeb on the 30th of March, 1906?

A. Yes, sir.

Q. Now, I want to know whether it is a fact or not, that Mr. Loeb, when you handed him that paper, said anything about this release?

A. Well—I do not know—I did not have much—I just handed the paper over to him—I do not know what release meant that time.

Q. What did Mr. Loeb say to you when you handed him that

paper which you had sworn to and which Mr. Field told you to deliver to Mr. Loeb's?

A. Let me see (after a pause)—well, I gave—handed this paper over to Jake Loeb's and we was talking in German and I asked him how about this settlement—I says I want \$2,000 if you want to make a settlement—then he says, well, we have got a paper made out—he says, we do not owe you anything—I says I do not know anything about it—I think that is what it was—that is the only conversation—I went this way—he went this way with an arm full of bottles in his hand.

Q. We have got a paper made out—that we do not owe you anything; that is what he said in German?

A. Yes, in German. I think I can explain it that way.

Q. That is what it means in English—we have a paper made out and we do not owe you anything?

A. I think so. He made the remark—there is lots of things been talked and I do not know anything about it.

Q. Didn't you ask him anything about that paper at that time?

A. No, sir.

Q. Did you report that conversation to Mr. Field?

A. I think I did.

Q. And told Mr. Field that Mr. Loeb's said that they had a paper made out that they didn't owe you anything?

A. I went over to his office that afternoon.

Q. That same afternoon?

Q. He told me to come back—what Jake Loeb's told?

Q. And you went and told him what Jake Loeb's told to you?

A. Certainly, I did.

Q. Now, did you ever have any conversation with Mr. Loeb's afterwards in which he referred to any paper of that kind?

A. No, sir; not that I know.

Q. Now, I will ask you to look at the signature on the back of these checks—the ones I show you—Joseph Schmitt—is that your signature?

A. Some of them, yes.

Q. Look at them and say which are yours and which are not?

A. (Examining checks heretofore introduced in evidence) That is mine.

Mr. CHILDERS: That is check——

428 A. These four—that is my wife's.

Q. These—you say your wife's—you knew about it?

A. No, sir.

Q. These checks you looked at marked "paid;" they are checks dated April 2nd, April 9th, April 18th, April 23rd and May 7th?

A. That is my signature on there, yes, sir.

Mr. FIELD: Two by his wife?

Q. These two here?

A. Yes, sir.

Q. You knew that she got the money on those two checks?

A. I did not know whether she got the money or not—she got the check—I never care for it—she pay the bills with it, I do not know if she got the check or not.

Mr. CHILDERS: To have this clear on the record, these four numbered 7003, 6971, 6953 and 6928 are identified by the witness as having been signed by him.

Q. These checks were paid after you had this conversation with Jake Loeb, were they not—were issued and paid after you had that conversation with Jake Loeb?

A. Of course, I—

Q. Were they or not—they are after the 30th of March, are they not?

A. Yes, sir; I know it.

Q. And although Jake Loeb told you that he had a paper which showed that they didn't owe you anything you continued to draw your pay from the brewery company although you were not rendering any service to the brewery company; is that the fact or not?

A. Because I take the advice of my attorney, yes, sir.

Q. Well, under the advice of your attorney, although you told him that Jake Loeb said that he had a paper—that the brewery company didn't owe you anything, you continued to accept this pay from the brewery company?

A. My attorney told me—I can take the money if they give it to me, yes, sir.

Q. And your attorney, the best lawyer in town, told you you could take the money if they would give it to you?

A. I did not ask for it; why, they gave it to me; they sent it to my house, yes, sir—money is represented to me I will take it any time; it don't make any difference when it is.

Q. I suppose that is especially true this week?

A. Sure thing.

Q. Did I understand you to say that you do not remember very well the conversation—as to whether any conversation took place between your sister and Doctor Carns—between you and Doctor Carns with reference to that finger?

A. No—not at present—my sister was not present. She went out every time when the doctor came in.

Q. And you are not exactly certain what conversation took place between you and your sister at the house?

A. We talk so many things that I cannot remember anything about it; it was nothing interfering with this suit in any way.

Q. Although you do not remember very well—were not at yourself—you do remember that nothing took place that would interfere with this suit?

A. No, sir.

Q. You remember that?

430

A. No, sir.

Q. Is that the way I am to understand you; that you knew that nothing took place that would interfere with this suit?

A. I do not understand you.

Q. I am trying to understand you; you say now that, although you were not at yourself during those three or four months, you do remember that nothing took place that would interfere with this suit?

A. Where about?

Q. At any time—at your sister's house or anywhere else?

A. After I filed the paper—yes, I was up in Dr. Carns' office yet—he bandaged my hands up afterwards yet—he says I was only three times at his office.

Q. I am talking about conversations and what was done during the months of January, February, March and April, while you were at the hospital and while you were at your sister's house and while you were at your own house after you left your sister's house?

A. I cannot remember much of it.

Q. But you do remember——

A. I told you.

Q. —As you stated a while ago that nothing did take place that would interfere with this suit?

A. I do not think I notified anybody about suit—I was never intended to sue the company anyway.

Q. Now, you say you never said anything in any conversation with Dr. Carns about Mr. Heacock?

A. No, sir.

Q. Did you ever have any talk with Mr. Heacock about this suit?

A. I had talked with him at my sister's house there when he passed by the street and he once heard it—and he told it to Dr. Carns himself, that is all what he knows about it.

Q. Did you call Mr. Heacock; was Mr. Heacock called into the house to talk to you about it?

A. No, sir; Mr. Heacock never was in that house yet.

431 Q. Did you go out and talk to him about it?

A. He once talked to me out in the yard; I never was outside on the street.

Q. And Heacock came there and talked to you about it.

A. He passed by the street—coming up Ninth street—he passed by there——

Q. You talked to him about it?

A. No, sir.

Q. Never said anything?

A. He said, hello Schmitt, you are out again—I am glad to see you—then he shook this hand—he says if I was you I would sue this company for \$50,000—he never did stop—you can ask him, too.

Q. That is all the talk you had with him?

A. Yes, sir.

Q. Heacock advised you to sue for \$50,000?

A. Yes, sir.

Q. He didn't offer to take the suit for half of it?

A. I did not intend to sue the company at that time.

Q. What do you mean by saying that at that time you didn't intend to sue the company; was that on account of this release, or why?

A. Because I didn't have enough sense in my head; I was not clear enough to realize anything what happened.

Q. You had not reached that point of sanity where you thought you could recover a big judgment against this company under Mr. Heacock's advice?

A. If I would have been in shape—I never would have signed a contract like that—and if I was not in shape I could not do it, that is true—if I was not in shape I could not do it.

Q. If you were in shape, you would not sign it?

A. No, sir.

Q. If you were not in shape you would not sign it and if you were in shape you did not sign it?

432 A. Did not sign it—what does that mean—did not sign it?

Q. That is, it was not your act—that is what you say?

A. I do not express myself right.

Q. Well, Mr. Schmitt, how many days after you delivered this paper to Mr. Loebs was it that you went to Mr. Marron's office—did I understand you to say about two days?

A. I do not know how many days was it.

Q. When your brother-in-law was with you?

A. Yes, sir.

Q. Don't you know how many?

A. Not exactly.

Q. About how many days?

A. I do not know.

Q. Didn't you say about two days?

A. I do not know—it may be—I cannot say exactly—two or three days.

Q. It was not a week, was it?

A. I do not know.

Q. I want your best recollection?

A. Well, I do not know.

Q. If you stated on your direct examination it was about 2 or 3 days—

A. If I stated it that way, it must be so.

Q. You stated your brother-in-law was along with you?

A. Yes, sir.

— Now, Mr. Marron mentioned the release to you at that time, didn't he?

A. I think he claimed one.

Q. He said he had a paper signed by you releasing the company—something to that effect?

A. Yes, sir.

Q. Did you report that to Mr. Field, too?

A. Yes, I went over that.

Q. You went back and told Mr. Field what Mr. Marron said?

433 A. Yes, sir.

Q. When was it that you spoke to this man Kelly and told him to go speak to Mr. Loebs?

A. Shortly before Mr. Field filed the suit, I think.



Q. If the suit was filed, I think on the 18th day of August, 1906,—filed in August, 1906—do you know if it was before or after? If the suit was filed in August, 1906, it was just shortly before the suit was filed you spoke to Kelly?

A. It was the same thing—when I received this letter from Mr. Field—the same thing—it shows you the date.

Q. You mean the same day that you received it?

Mr. FIELD: When I wrote the letter to the brewery?

Q. The 20th of November?

A. It was the day afterwards, I talked to Mr. Kelly.

Q. That was after suit was filed?

A. I do not know, if whether afterwards or not; the paper will show it.

Q. Mr. Field didn't write that letter until after suit was filed, did he?

A. I do not know—I turned it entirely over to Mr. Field.

Q. You took the letter and delivered it yourself, didn't you?

A. No, sir.

Q. Was it mailed?

A. Yes, sir.

Q. And then you commissioned Mr. Kelly to speak to Mr. Loeb for you?

A. Because Mr. Field told me I should come down and let him know what Jake Loeb says.

Q. Well, you told Mr. Kelly to speak to Mr. Loeb for you?

A. Yes, sir.

434 Q. What did you say you told Mr. Kelly to say to Mr. Loeb?

A. I told him to ask Mr. Jake Loeb he should give me the bill what I owed him for all expense he paid till now.

Q. Is that all you told him?

A. That is all.

Q. And you do not know what Mr. Loeb said in answer to that.

A. No, I never had any reply.

Q. Why did you want that bill?

A. Because I wanted to pay it—that is the reason want to pay that bill of expense? I asked for it.

Q. Why did you want to pay it—why did you want to pay that bill of expense?

A. Because I had the advise from my lawyer to ask them.

Q. Did you ask him for the money you had collected between the 2nd day of January and the 7th day of May when you were not working for the brewery company—did you ask for that item or tell Mr. Kelly to ask for it?

A. What is that?

Q. Did you tell Mr. Kelly to ask for the amount of money which you had received, \$21 a week from the second day of January?

A. I didn't receive \$21.

Q. \$20 up to the 7th day of May?

A. No, sir.

Q. Or any part of it?

A. No, sir. A. No, sir, I asked him the whole expense they have—the whole of it, that is all I ask Mr. Kelly.

Q. I am talking about what you asked Mr. Kelly; that didn't relate to the wages you received while you were not working?

A. No—just everything—for the whole amount—that I owed them for all expense.

435 The hour of 12 o'clock noon having arrived a recess was taken until 2 p. m.

Cross-examination of JOSEPH SCHMITT, Plaintiff, resumed:

Q. I understand you to say that you were in Mr. Ackerman's office and had a conversation with Dr. Carns?

A. Yes, sir.

Q. When was that?

A. That was about two months ago, I think.

Q. About two months ago?

A. Yes, sir.

Q. He said to you that your hands were very good, did he; what did he say to you about your hands at that time?

A. He didn't say anything about my hands; he asked me how is your hands? and I said they was awful bad.

Q. Had you quit the employment with the brewery company at the time you had this conversation?

A. Yes, sir.

Q. How long had you been out of employment of the brewery company?

A. How long?

Q. Yes—before you had this conversation?

A. About a week or two.

Q. What was your object in quitting the employment of the brewery company?

A. That I quit the brewery company.

Q. Why did you quit: have you got any other employment?

A. We had a little bit of words together—not Mr. Loeb's—another man.

Q. What other man?

A. Brotherinlaw of mine.

Q. You had some words with a brotherinlaw of yours?

A. Yes, sir.

Q. And therefore you quit the employment of the brewery Co.?

436 A. I asked Mr. Loeb's, if you do not get this man out of this position here, I am going not to work with this man any more.

Q. Is it not a fact that you stayed in the employment of the brewery company until this term of court came on and then quit for the purpose of trying this case?

A. No.

Q. That is not the fact?

A. No, sir.

Q. But you quit because you had some words with a brotherinlaw of yours?

A. Yes.

Q. And Mr. Loeb would not discharge your brotherinlaw?

A. I do not know.

Q. You do not know; well, who does know?

A. I do not know—not me.

Q. You just said that you told Mr. Loeb that you would quit unless he would discharge your brotherinlaw, didn't you?

A. I told him that I am not going to work with this man no more so long as that man is in this business.

Q. Who was that man?

A. Mr. Schiler.

Q. Can you explain how that happened just about the time this term of court was coming on?

Mr. FIELD: I cannot see the relevancy of that and it certainly is not cross examination.

Mr. CHILDERS: I propose to show by this witness that the relations of the defendant company with the plaintiff were perfectly amicable, that they paid him for services when he was rendering services and when he was not and paid all expenses.

437 Mr. FIELD: You have shown all that.

Mr. CHILDERS: And that he quit because he had a row with his brother-in-law.

The COURT: As I understand him he was employed in some position where he had to work with him——

Q. Was your brother-in-law over you?

A. No, sir.

The COURT: He gave the name.

Q. When was it that you had the conversation with Dr. Carns at Mr. Ackerman's office?

A. When?

Q. Yes?

A. About 2 months ago.

Q. Was Dr. Ackerman paying attention to the conversation when you had it?

A. I cannot tell—he didn't interfere with us.

Q. That is you mean to say that he didn't take any part in the conversation?

A. No, sir.

Q. Now, with reference to the little finger on the left hand, you say you had no trouble with it before you had this accident?

A. No, sir; never had.

Q. But it was contracted?

A. It was contracted a little bit—it was not stiff and never had any trouble with it?

Q. Was any other finger contracted in the slightest degree before you had this accident?

A. No, sir, not if I know.

Q. Not if you know—but one of them was?

438 A. That little one was—just a little bit.

Q. Is it any more contracted or not?

A. Yes.

Q. How much more?

A. It is stiff entirely—it is all grown up—you see it ought to be open way back here.

Q. And Dr. Carns never said anything about straightening out that finger or any other finger?

A. No, sir, not if I know—he wanted to cut them off.

Q. Not if you know?

A. No, sir.

Q. I want to understand you; do you mean to say that he didn't say anything of the kind to you, or that you do not remember?

A. I do not know if he did say it or not—I say I do not know.

Q. You do not know whether he told you to come to this office after you were able to go out and that he could straighten the fingers out for you, or not?

A. He didn't state.

Q. You are positive he didn't say that?

A. I am positive he didn't state—he told me all the time he wanted to cut off these fingers—that is the only question he ever did mention.

Q. All that he ever said to you was that he wanted to cut off some fingers?

A. Yes, sir.

Q. Now, how many fingers did he want to cut off?

A. Both these two little fingers.

Q. And you are positive about that?

A. Yes, sir—that is what I listened.

Q. That he wanted to cut off the two little fingers?

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. Now, when was it that he first told you he wanted to cut off those two little fingers and where was it?

439 A. It was at my sister's house once.

Q. Who was present?

A. My brother was there.

Q. Your brother—your brother or your brother-in-law?

A. My own brother.

Q. What is his name?

A. Frank Schmitt.

Q. He was there and he heard Dr. Carns say he wanted to cut off those two little fingers?

A. Yes, sir.

Q. Is he here?

A. No, sir, is not here at present—he was here at that time.

Q. Where is he now?

A. He is in Golden, New Mexico.

Q. Up in Golden?

A. Yes, sir.

Q. What did you say to Dr. Carns when he proposed to you to cut off those two little fingers?

A. He said they was stiff, they are stiff anyhow and they was always in your way.

The COURT: That is what he said?

Q. Then what did you say?

A. I says you cannot cut on my fingers. I have suffered enough for it.

Q. Did you say anything about them having been stiff before or contracted before?

A. I says, they was a little crooked—that is what I said—they was not stiff.

Q. You tell the jury your fingers were a little crooked, but they were not stiff?

440 Mr. FIELD: He didn't say his fingers.

Q. Did you say your little finger was a little crooked?

A. But not stiff.

Q. Never bothered you?

A. Never bothered me before.

Q. How many fingers were a little crooked and not stiff and didn't bother you before?

A. How many fingers?

Q. Yes?

A. None of them.

Q. None of them?

A. No, sir.

Q. You told him about that one, didn't you?

A. Which one?

Q. The one he wanted to cut off?

A. He wanted to cut off two, because through the accident them fingers got stiff—both of them and he wanted to cut them off—that is the reason why.

Q. Well, how many fingers did you tell him were crooked and had been crooked before the accident?

A. What is that—I did not get that?

Q. How many fingers were you referring to when you said to him that they had been a little crooked before and had not made you any trouble?

A. Just that one little finger.

Q. Just that one little finger—both little fingers had not been crooked before then?

A. No, sir.

Q. Yet, he proposed to cut off two fingers?

A. Yes, sir.

Q. The little finger on both hands?

A. Yes, sir.

Q. You say that when you were taken home from the brewery on the morning of the 2nd of January that you didn't know anything?

A. No, sir.

Q. I understood you to say when you were on the witness  
441 stand the other day that you didn't know anything from  
the time that that malt struck you coming out of that  
cooker; is that the fact or not?

A. What is that?

Q. I understood you to say the other day——

A. Not, if I know, if I know something about it.

Q. Do you know Louis Overmeyer?

A. I know Louis Overmeyer, yes, sir.

Q. Did you have any conversation with him before you were  
taken home on the 2nd day of January?

A. Not that I know—I never seen him—after I got hurt—not  
as I know it.

Q. You didn't tell him anything about how the accident hap-  
pened?

A. No, sir.

Q. You didn't tell him anything about how the accident hap-  
pened?

A. Not as I know.

Q. You didn't talk with him about sending for a doctor?

A. No, sir; I do not know anything about it.

Q. Do you remember when you were in the office about asking  
Henry Loeb to turn on the steam, that you were cold, before you  
went home?

A. No, sir; I cannot remember that I have.

Q. You do not?

A. I cannot remember that I have seen Mr. Loeb that morning.

Q. You do not remember ever having seen Mr. Loeb that morn-  
ing?

A. No, sir.

Q. Do you remember having seen Overmeyer that morning?

A. No, sir.

Q. Or the engineer?

A. No, sir.

Q. Do you remember having seen anybody after you got out of  
that brew house that morning?

A. Not that I can remember.

442 Q. You don't now recollect having seen a living soul?

A. No, sir.

Q. Now from the time that you went up there to cut off that  
small valve—to close the small valve, letting the steam in from the  
bottom of the cooker, what is the first thing from that time, after  
that, that you remember, and that you did remember and that you  
did know, when it took place, as to meeting anybody, talking with  
anybody, or what you did?

A. What was that?

Mr. CHILDERS: I would change the question.

Q. From the time you went up there as you have testified to close  
that small steam valve—opening the steam valve into the bottom  
of that cooker, and the accident happened, immediately following,  
what is the first thing you remember or knew when it occurred,

either as to speaking to anybody, seeing anybody or doing anything?

A. I cannot get that question—I cannot understand you, Mr. Childers, what you mean?

Q. I will have it read to you again?

Q. (Repeated.)

A. You say open the valve and close it again—I cannot get at what you mean by that.

Q. (Repeated.)

A. (After a pause.) I cannot understand the question.

Q. That is too hard a question, is it?

The COURT: He means when did you come to yourself; what was the first thing you knew after the accident?

A. After the accident?

443 The COURT: That is it, is it, Mr. Childers?

Mr. CHILDERS: That is the effect of it.

A. I cannot say anything about it—I do not know—I do not understand—I cannot understand you quite, your honor.

Q. You do not understand the judge, either, do you?

The COURT: There came some time when you knew what was happening, I suppose, after while; now, what was the first thing you can remember after it happened?

Q. After you came to yourself?

A. After the accident—I do not know—I think it was up to my sister's house—I believe it was.

Q. How many weeks was that after the second day of January?

A. How many weeks—I do not know, about 7 or 8 weeks—6 weeks or 8 weeks—I do not know.

Q. It was 7 or 8 weeks after the accident, the first time that you ever had sufficient reason or consciousness, had you to know what you were doing; is that what you mean to have the jury understand?

A. That I know, yes—that I understand something a little bit decent.

Q. Did you understand something a little bit indecent during these 7 or 8 weeks?

A. I could not understand anything up in the hospital, I know that.

Q. Well, do you know when you left the hospital?

A. I do not know—no—I know it by the talk of the people between themselves.

Q. You do not know except from what somebody told you where you were in the hospital four weeks or four months—?

A. Just through hearings.

Q. That is the only way you know it, from hearsay?

A. Yes.

Q. You do not know how many weeks you stayed at your sister's house, do you?

A. Well, they have been telling me when they have taken me there and I figure it out afterwards, sure thing.

Q. The only way you know that is what they told you and as you figured it out afterwards?

A. Yes, by hearing.

Q. From your personal recollection and your knowledge of what was occurring, you have no knowledge on the subject?

A. Not much.

Q. Not much?

A. No, sir.

Q. You don't remember who called on you—or who called to see you at the hospital while you were there?

A. No, sir.

Q. You don't remember ever seeing Mr. Marron there on the 6th day of January?

A. No, sir.

Q. You don't remember ever seeing your wife or sister up there that same day?

A. No, sir.

Q. You don't even remember the name of the Sister who nursed you, do you?

A. No, sir.

Q. Everything that took place while you were at that hospital is a perfect blank to you as far as that is concerned?

A. Not as I take any notice about it of anything.

Q. After you left there it was just as if you had not been  
445 in existence for that period of time, is that what I am to understand?

A. No, sir.

Q. Is that a fact or not?

A. Yes, sir.

Q. That, so far as you are concerned, whatever time you spent at that hospital is a perfect blank?

A. Yes, sir.

Q. You don't remember that you ever had been taken there?

A. No.

Q. You don't remember that you ever had been brought away from there?

A. No, sir; not that I can remember, only what I know what the people told me.

Q. Do you remember ever having taken a glass of beer at the hospital?

A. I do not know, I cannot remember.

Q. Do you remember ever having asked for any beer while you were at the hospital?

A. No, sir; I cannot remember.

Q. Do you remember the names of the Sisters who took care of you while you were there?

A. No, I do not think I did—I do not know it yet—I do not know it today.

Q. You do not know today who they were?

A. No, sir; and I do not know the Sisters whatever—I do not know her face—I cannot explain it.

Q. Don't you know that they were Sisters of Charity?



A. I know that from before—sure thing—from before I got hurt.

Q. But you don't know it from having seen them in the room when you were there?

A. Well, I might, but I did not paid any attention to it.

Q. Well, did you or not, know anything—if you didn't know anything—you would not know that would you?

446 A. Probably, but I cannot swear to it.

Q. You can state whether you remember having seen any Sisters paying any attention to you and looking after your wounds, can you not?

A. Maybe little—maybe—I cannot swear to it—I cannot say what kind of condition I was—I do not remember much about the hospital at all—whatever.

Q. After you came down to your Sister's house, do you remember who took care of you down there?

A. Yes, till after I was about 2 or 3 weeks—then when I was down 2 or 3 weeks afterwards.

Q. When did you come down from the hospital—when you came down to your sister's house, how long did you stay there?

A. Well, they told me about four weeks.

Q. They told you?

A. Yes, sir.

Q. You do not know yourself?

A. Well, I did not know it when they brought me down.

Q. You don't know when you left there either, do you?

A. Well, yes—no—I cannot say exactly when it was—not the day.

Q. Do you remember being brought down there?

A. No.

Q. Do you remember ever riding around the streets in a buggy with anybody?

A. Well, that was about a week before that he gave me the privilege to go home.

Q. Was that the first time you ever rode around in a buggy?

A. I think it was—it was about a week before I get home.

Q. Did you ever go down to Doc Carns' office in a buggy?

A. No, sir.

Q. What were you doing in the buggy?

447 A. What was I doing—they took me around riding, I suppose.

Q. Who was with you?

A. I think the nurse.

Q. This man, Tom Milet?

A. I think so.

Q. Just riding around?

A. He took me around so I get fresh air, that is the purpose of it, I suppose.

Q. When was the last time that you ever saw Dr. Carns while he was treating you?

A. The last time?

Q. Yes?

A. That was about when he told me about his bill—that he turned his bill in—that was about in March, some, I believe.

Q. When he turned his bill in?

A. Yes.

Q. Did he turn his bill into you?

A. He says, he says he is going to turn his bill into the brewery.

Q. What time in March was that?

A. I do not know; it was just about the end of March, I believe.

Q. The end of March?

A. He told me the price—what he charged for it.

Q. Where was that conversation?

A. In his office.

Q. Had he asked you to come back there to let him treat your hands at that time?

A. Yes, sir, and it was my intention to come back.

Q. Why didn't you go back?

A. Because, I could not—I could not go out of the house.

Q. Why could you not go out of the house?

A. Because, when I went down before—when I went down to get bandaged up, I had only these fingers open a little bit on top.

Q. Which fingers?

448 A. These two fingers here—this one—the little finger—and the one next to it—they was open yet.

Q. Open?

A. On top—right on the knuckles yet.

Q. They were sup-er-vating?

A. There was the wound yet—open yet on top.

Mr. FIELD: Had not healed?

Q. Was there matter and stuff coming out of them at that time?

A. It could not matter, because he put medicine over it so it could not matter.

Q. You mean the skin had not entirely healed over it?

A. No, sir.

Q. New skin had not been formed?

A. No.

Q. He told you to come back?

A. Yes, sir.

Q. Why didn't you go back?

A. Because I could not go back.

Q. For what reason?

A. Because when I went down, my wife put a handkerchief around my hand, because it was awful cold, and when I came up to his room, he took them handkerchiefs off and after he got done with fixing up these fingers, I told him to put them handkerchiefs on again—it is cold—it is too cold, on my hand, to effect yet—it won't stand the air.

Q. That was in the month of March?

A. Yes, sir—and he told me the air won't hurt them—that does them good and he kept them off—he says, you leave them off and he put them in my pocket, or I did—I think I did myself—I think he said I should put them in my pocket.

Q. And you didn't go back any more?

449 A. The same day when I went to bed I could not stand it any more for pain and I told my wife to put some balsam over it—to keep the pain down and kill it off—she put balsam on and put bandage on—bandage I had left from the hospital—from the nurse—she put bandage on it and I slept a couple of hours and I woke up for pain, and next morning when I woke up the one bandage was hanging off—the whole top of the hand was blistered, clear up that high, with water under the skin—under that new skin and then I told my wife how is that, and I showed it to her; then she says right away you will not go down to this doctor's office any more—the next day, it was the same weather again—I had the same medicine left what the nurse used for me at my house—he came over and see me a couple times—bandages it up at my house—used that medicine and bandaged the hand up like the nurse did—we had that weather—that cold weather the same week through, and I could not go out of the house on account of them open hands and they healed up right along again and my wife says, well, I think it is not necessary to go down—he would not come around to see while you could not go down out of the house and you do not need to go down and see him any more either.

Q. What time in March, 1906, was that; what week in the month was it?

A. I think it was the end of March.

Q. Did he come to see you twice at the house after you left his office that time?

A. Who?

Q. Dr. Carns?

A. He never was in my house.

Q. Then the last time you ever saw him in connection with these injuries was when you was in his office that time?

A. Yes, sir.

450 Q. That was the last day when I brought him the urine of my little child, he was talking about—I did not employ him—and I did not go—I did not get no—

Q. I have not asked you about that? The medicine the nurse put on and that you put on when you went home was balsam?

A. Yes, sir; my wife put that on in the evening.

Q. And your hands were a little puffed up?

A. The whole top of the hand—was swollen.

Q. Swollen?

A. Yes, sir.

Q. What week in March—the last week?

A. Or week before; I do not know.

Q. Was it very cold?

A. Yes, sir.

Q. Very cold?

A. Yes, sir; the coldest weather we had; I guess you will remember.

Q. He told you there was no danger in exposing your hands to the aid—it would benefit you?

A. Yes, that is what he said—that is the reason he kept the handkerchiefs off—I could not put it on myself—I told him to put it on.

Q. He left them off?

A. Yes, sir.

Q. And you put them in your pocket?

A. Yes, sir; he told me to put them in.

Q. And you went away from his office?

A. No, sir; I never come down.

Q. You went away that time with the handkerchief in your pocket?

A. Yes, I follow his order because he was my physician.

Q. Now, you stated this morning that the time that Hegerich spoke to you about bringing a suit, that you had no intention of bringing a suit against the brewery company?

A. No, sir.

Q. That is, you mean you did not say that—you mean you did not intend to bring a suit?

451 A. No, sir.

Q. Why didn't you intend to bring a suit?

A. Because I was wanting to go to Mr. Marron's office to make a settlement with Mr. Marron.

Q. You expected to go to Mr. Marron's office and make a settlement?

A. Yes, sir.

Q. How did you know that Mr. Marron had anything to do with it at that time?

A. Because Mr. Marron always was tending to the brewery business.

Q. Did you ever have any business with Mr. Marron in connection with the brewery?

A. Not before.

Q. How did you know Mr. Marron attended to the brewery business?

A. Because I know Mr. Marron is interested in that brewery property near since I am employed there.

Q. Is that so; how do you know that I did not represent the brewery company?

A. I do not know that—it is none of my business.

Q. Was it any more your business to know that Mr. Marron represented the brewery company than it was to know that I represented it?

A. No, sir.

Q. Mr. Marron happens to be a director in the brewery company; how do you know that I am not a director?

A. Because I never had any reference to you.

Q. Well, it is a fact that both of us happen to be connected with the brewery company—you didn't know that, did you? Is it not a fact if the reason that you didn't intend to bring a suit was that you expected to go and see Mr. Marron; that you asked that Mr. Marron

came up there to see you about the brewery company in connection with your injuries?

A. What was that—I wanted to get something out of the company to pay me for my injury I received in their employment.

152 Q. And when Mr. Heacock spoke to you about it, you expected to go and see Mr. Marron about it?

A. I expected that Mr. Loeb was there—Mr. Marron call Mr. Loeb the same time.

Q. That is after you went there?

A. The same time.

Q. You testified this morning that you didn't intend to bring any suit against the brewery company at the time Mr. Heacock was talking to you?

A. No, sir; I didn't pay heed to Mr. Heacock's intention whatever.

Q. You did not understand me; you said you didn't intend to bring a suit at that time; now I ask you why you didn't intend to bring a suit?

A. Because I want to make it nice with the brewery and I didn't want to sue the company.

Q. And you expected to go and see Mr. Marron and make a settlement?

A. Yes, sir, and Mr. Loeb.

Q. Why did you expect to go and see Mr. Marron, that is what I am asking about?

A. Because—I do not know—I can explain that.

Q. What business did you ever have with Mr. Marron in relation—in connection with the brewery company before this matter came up?

A. As a stockholder, I suppose.

Q. Are you a stockholder in the brewery company?

A. No, sir.

Q. What business did you have to do with Mr. Marron as a stockholder in the brewery?

A. Well, I thought that was the proper way to go to him, because he was the attorney for the brewery as much as I heard.

Q. How do you know he was the attorney for the brewery company?

A. Well, through talking of the other people.

Q. What other people?

A. Whole lot of them.

153 Q. Whoever told you that he was the attorney for the Brewery Co.?

A. That was the talk around through the employes of the brewery, all over, all the time, up to today.

Q. Did the brewery company ever have any lawsuits that you ever knew about?

A. Only one that Mr. Henry Loeb mentioned once.

Mr. FIELD: It seems to me your honor, that this gentleman has about exhausted this subject.

Q. Now, you testified here that you went into that cooker when Mr. Ridley was there?

A. Yes, sir.

Q. Yourself?

A. Yes, sir; on the order of Mr. Henry Loels, yes, sir.

Q. And put a stick down there; what was that you said?

A. I says Mr. Henry Loels reached that stick in himself.

Q. Now, who examined that cooker on the inside, you or the old man Ridley?

A. Well, old man Ridley, Henry Loels and I all three of us were in the tank.

Q. All three of you in the tank; What did Henry Loels say to you when he told you to go inside of that tank?

A. The boiler maker came and he came in the yard—he hollered what is the matter, in the brewery again, and I said Henry Loels is in the bottling works, you can go in and ask him.

Q. I didn't ask you for that; I asked you what Mr. Henry Loels said to you when he told you to go inside that cooker; you probably didn't understand that question?

A. That is what I am going to come to.

454 Q. Come to it right at once, without something else?

A. He sent the boiler maker to me—I should show him where the tank is and let him in, and Mr. Henry Loels came after us,—after we were inside.

Q. Mr. Henry Loels told you to show him where the tank was—the boiler maker?

A. Mr. Loels gave me instructions himself.

Q. I have asked you what Mr. Henry Loels told you and nothing else?

A. He told me to go with this man and show him the tank.

Q. Mr. Henry Loels told you to show him the tank?

A. Yes, sir—with the boilermaker.

Q. Do you mean he came with the boilermaker?

A. With the boilermaker out of the bottling works, yes, sir.

Q. Did he tell you to go along with the boilermaker and show him the tank?

A. With the boilermaker and go in the tank and show him where it is.

Q. Did the boiler maker go along with you?

A. Yes, sir.

Q. That is, you mean Mr. Ridley?

A. Yes, sir; Mr. Ridley.

Q. Mr. Loels told you to go with Ridley and show him the tank?

A. Yes, sir.

Q. You went?

A. Yes, sir.

Q. Did he tell you to go down into the tank?

A. Yes, sir.

Q. Now, you say all three of you went into the cooker?

A. Yes, sir.

Q. Which went first?

A. I went in first with a ladder and I hold the ladder inside that the old man would not fall down, because it was a dish  
455 bottom and most of the times it slips out, and the old man might fall down in there and break his neck. I put the ladder down in there—the old man went down—I went down first and the old man came after me.

Q. You went down and fixed the ladder and the old man followed you?

A. Yes, sir.

Q. Then Henry Loebs came in?

A. Yes, sir.

Q. The three of you were down there at the same time?

A. Yes, sir.

Q. Did the bottom fall out while you were down there?

A. No, sir.

Q. Who pointed out the defects to the old man Ridley, if anybody?

A. I did.

Q. You showed him those patches?

A. I showed him one—there was only one on there.

Q. The second one had taken the place of the second one you had put on?

A. No, sir; the second one was about 4 feet away from the old patch—from the other one.

Q. 4 feet apart?

A. Yes, sir, probably 3 feet.

Q. When was that put on?

A. That could be on two or three weeks before the accident happened.

Q. That was put on after old man Ridley examined it?

A. Yes, sir; after he went away.

Q. You made a very thorough examination of the tank, with old man Ridley?

A. Yes, sir, while Mr. Loebs was there.

Q. Did you have any conversation with him about how to use the tank?

456 A. Mr. Loebs asked him how the tank was and so forth—he took his hammer and tested it—he says it looks pretty thin around here.

Q. Said it is pretty thin around here?

A. Yes, the way the sound was—Mr. Henry Loebs heard it, too.

Q. He hammered it all around everywhere?

A. Not all around, just on the front side.

Q. He made a very thorough examination of it, didn't he?

A. I made the remark about in the back side and I showed the old man that he should see in the back side—it looks kind of rusty,  
457 too—then I asked this man if it is not better—his intention was to put a patch in—

Q. Didn't he examine that, too?

A. Yes, sir.

Q. He hammered all round.

A. Just on the bad places.

Q. You say his intention was to put only a patch on: how do you know it?

A. Just cut a piece out of it where the bad places was and refit a new piece on.

Q. How do you know that?

A. Well, because he said so before.

Q. Who said that?

A. When he seen.

Q. Who said it?

A. Mr. Ridley.

Q. What did you say when he said that?

A. I told him you better look the back side of it, too—it looks kind of rusty.

Q. Kind of rusty?

A. Yes, rusty from leaking from the water valve—it been leaking all the time.

Q. Rusty inside?

A. Inside the tank, yes, sir—he went over and looked at it—he says, yes, I think the best way is to put a whole new bottom in it—then he tried to start to take the measurement of it—then  
457 he said we need a stick—then Mr. Loeb went outside and handed us the measure stick for the water—where we take measure from the water—he handle us that stick in, and the old man he take the measure of it and I help him and the while—Henry Loeb was on top of it and looking through the man hole.

Q. You put a patch on it after that, didn't you?

A. After that; yes, sir.

Q. How long after that?

A. About 3 weeks before the accident happened.

Q. When was this—about the 1st—toward the 1st of December, 2nd, 3rd or 4th of December?

A. It was about commencing December—about the 10th or 12th, around like that.

Q. About 3 weeks after that you put another patch on that?

A. About 3 weeks after that.

Q. That would be about Christmas time, would it not?

The COURT: When was it?

Mr. CHILDERS: He said about three weeks after that, he put a patch on that.

The COURT: He didn't fix that; whether he meant the time he put the patch on or the time the boiler maker was there—

Mr. CHILDERS: I will ask him.

Q. Do you mean it was 2 or 3 weeks before the accident happened that the boiler maker was there?

A. Well, I cannot say exactly when he was there, but he was there about a couple of weeks before I put that patch on—one or two weeks—I do not know exactly when it was.

458 Q. It was about two weeks after the boiler maker was there, you put on the second patch?



A. Put it on about two or three weeks before the accident happened.

Q. That was two or three weeks before the accident happened?

A. Yes, sir.

Q. That is what you mean to be understood?

A. Yes, sir.

Q. Now, when did you put the first patch on there?

A. In August, something like that, in August.

Q. August, 1905?

A. Yes, sir.

Q. You called Henry Loebs attention to it at that time?

A. Yes, sir.

Q. You are positive about that?

A. Yes, sir; I am positive—I have got witnesses for it.

Q. I am not asking about your witnesses; they can speak for themselves?

A. I say I can prove it.

Q. You put that on with a bolt, did you?

A. Yes, sir.

Q. And you used white lead to keep that from leaking?

A. Mr. Loebs told me to put it on; yes, sir.

Q. That was in the month of August?

A. Yes, sir.

Q. How long did it take you to put that on and what time in the month was it?

A. It was in August when I put it on—when I cut the floor out the same day I put the patch on.

Q. Was it the first week in August or the last week in August.

A. It was some time in August.

Q. How do you know it was in August?

A. Well, it was in the middle of the summer.

Q. How often were you brewing at that time?

459 A. Three times generally—three times.

Q. Three times what?

A. A week.

Q. That is, every other day you were brewing?

A. Yes, sir.

Q. What time did you get to put that patch in there in August?

A. The day after the brew, when it is empty.

Q. Did you have it on before the next brewing—is it not a fact that between the making of one brew and the beginning of another one, there would not be time to put that patch on in the month of August, if you were brewing there every other day?

A. That tank is empty for a whole day; yes, sir, I put it on before noon.

Q. That is the same place that you put the second patch on there in December, is it not?

A. No, sir; it is about 2 or 3 feet away from this patch what I put on a couple of weeks before the accident.

Q. Well, when the accident happened there were 2 patches on the bottom of the tank then?

- A. There was 2 patches on that tank, yes, sir.
- Q. How far apart were they?
- A. About 2 or 3 feet apart—I did not measure it.
- Q. How far were they from the wall, or what I have called the wall of the tank?
- A. The shell you mean?
- Q. The part that stands up — that (indicating)?
- A. The first one I put on was about four or five inches away, and the other one was about an inch and a half, or inch, something like that, pretty close to it.
- Q. The one you put on in August was the first one—you call the one you put on in August the first one?
- A. It was about three or four or five inches away from it—I did not measure it.
- Q. And the other one an inch and a half?
- A. Inch or inch and a half—something like that.
- 460 Q. Did you see that—did you see how thin that bottom was when Ridley was down there testing it with his hammer?
- A. I left that entirely to the boilermaker. I did not ask him for any information whatever.
- Q. You saw how thin it was when you were drilling those holes in there to put those patches on, didn't you?
- A. Yes, sir; in the place where it was bad—sure thing.
- Q. Was it very thin there?
- A. Very thin—it was a hole in it—it didn't need to be very thin—it was a hole in it.
- Q. How large was the hole—could you stick a pencil through it?
- A. About the size of a pencil.
- Q. About the size of that penholder?
- A. About like that.
- Q. As big as that?
- A. Yes—not quite half an inch—it was a little crack not quite half an inch long.
- Q. It was not a hole, but a crack there, was it, half an inch long?
- A. It formed from the hole, yes, sir.
- Q. It was not only a hole, but a crack from the hole, half an inch long?
- A. Yes, sir; it was a little crack.
- Q. That was in August?
- A. Yes, sir.
- Q. You could see how thin it was there, could you?
- A. Yes, sir—I called Mr. Loeb and he seen it himself.
- Q. How thin was it there—what was the thickness there?
- A. On one side it was a little larger and one side you could not look through, but you could see the air—the daylight from below.
- Q. You could see daylight through a very small puncture of anything, can you not?
- A. That is—direct outside.
- 461 Q. How thin was it right around that crack and that hole—you were on the dark side weren't you?
- A. Well, it was just a place where it was rusted—I showed Mr.

Henry Loeb and he seen it and I asked him what he was going to do about it.

Q. I did not ask you about that; now it has been said here that you have stated that there was a chain dragging around on the bottom of that tank attached to the stirring gear?

A. Yes—there was.

Q. Is that the fact?

A. Yes, sir; there are two arms in there and the other arm there is a chain attached to it.

Q. Well, did that bottom appear to you to have been scoured out by that chain—scoured and worn away by friction?

A. Maybe.

Q. Did it or not?

A. I think it did.

Q. And it appeared to you that way in August, did it?

A. Yes, sir.

Q. Did you go inside when you put on the second patch?

A. Sure thing—I go inside—I tighten up the bolts myself and had somebody outside to hold up the bolt so as to keep from turning.

Q. It appeared to be still more worn away by the use of this chain, didn't it, by December?

A. I think it was.

Q. You say you had no conversation with Mr. Loeb about Ridley having been there after he went away, about any order for a new tank or bottom?

A. No, sir.

Q. You never heard anything said about any new bottom for the tank?

A. No, sir.

Q. Between Ridley and Loeb or between you and Loeb?

462 A. No, sir.

Q. Nothing was ever said to you about any new bottom for that tank?

A. No, sir.

Q. At any time?

A. No, sir.

Q. By anybody?

A. No, sir.

Q. Or in your presence?

A. No, sir—only the day before the accident happened, he told me—

Q. Now, what did he tell you that day?

A. He told me—I asked him when I pumped the water in—it was between 10 and 11 o'clock—I think we went home a little after 11 o'clock—and I asked him, ain't you ever going to have this thing fixed—he says, yes, sir, he says, we are going to have it fixed as soon as the bottom is ready—to put them in—it has been ordered long enough.

Q. It that all he said to you about it?

A. Well, he went up-stairs then, and took his shoes off—whatever

he done—I think he changed his shoes and that was all—what I had the conversation with Mr. Loeb only before I went home, he told me, you will be here on time tomorrow morning—that is all I remember.

Q. All he said to you, we are going to have this thing fixed; that is all he said to you?

A. What is that?

Q. All he said to you is what you stated a while ago, that we are going to have this thing fixed?

A. That it is going to be fixed, yes, sir.

Q. That is the first time he ever said anything to you about any new bottom—to you?

A. That was the first thing—Mr. Loeb, I think I know it because I was with him to take the measure.

Q. You understood they were going to do it, because you saw them take the measure?

A. Yes, sir.

463 Q. But Loeb said nothing to you about it at that time?

A. No, sir.

Q. The only time he ever did say anything to you about it was on this first day of January—that is what you just stated, is it not?

A. I cannot remember if that is the only thing we had—I do not know—that is about two or three years—I cannot remember it exactly.

Q. You cannot remember exactly?

A. No.

Q. Now, all you do remember he said to you was, we are going to have this thing fixed?

A. What is that?

Q. All you remember that he said to you was, we are going to have this thing fixed; that is what he said to you on the first day of January?

A. Well, he said that, when I asked him if you are ever going to have this thing fixed—he says, yes, we are going to have it fixed—we have to brew a couple of times while we have this done.

Q. You didn't say that a while ago?

A. I said it the other time and I say it now.

Q. He said you have to brew a couple of times before you have it done?

A. Well, he said, it ought to be done already—generally takes a couple of months before we ever get something done.

Q. Now, when you first testified, did you say anything about his telling you that they had to brew a couple of times before getting something done?

A. I do not know if I said so or not—if I said so, I guess that is the truth.

Q. You didn't say so awhile ago?

A. I do not know if I did say so—if I said so, you must have it in the record, I think.

Q. What did you say to him that caused him to make that reply to you?

A. Which reply?

464 Q. Well, we are going to have this thing fixed, we have to brew a couple of times before it is done, it takes a couple of months before we get anything done?

A. That was that morning.

Q. What did you say to him that caused him to tell you that?

A. I think I called his attention to it, that the cooker was leaking a little bit when I pumped the water in.

Q. Was it leaking a little bit?

A. Yes, sir.

Q. Where was it leaking?

A. In one of those patches.

Q. One of those same patches?

A. Yes, sir.

Q. How much was it leaking?

A. Not much, just a little drop.

Mr. CHILDERS: That is all.

Redirect examination by Mr. FIELD:

Q. Mr. Schmitt, at the time that the brewery company was paying you these checks, what, if any, knowledge had you that they were pretending to pay them in pursuance of this release?

A. I do not know—not of anything whatever.

Q. You were asked about having consulted your attorney, the best lawyer in town, and what he told you about your rights; I will ask you if your attorney didn't tell you that you could take money from the brewery, if they wanted to give it to you, without hurting your case, but you must not ask them for any money?

A. That is what you told me, yes, sir.

Q. Now, I will ask you if you ever knew what purported to be contained in this release until after the answer was filed in this case?

A. I never knowed anything about it.

465 Mr. CHILDERS: I think that was asked on the direct examination.

The COURT: I do not think it will do any harm.

Mr. FIELD: That is all.

J. A. BEAL, introduced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. State your name?

A. J. A. Beal.

Q. Do you know Dr. Carns?

A. Yes, sir.

Q. State, Mr. Beal, whether or not you wrote a story for the Evening Citizen on the 6th day of January, 1906, with reference to the case of Joseph Schmitt?

Mr. CHILDERS: I object to the question as irrelevant, incompetent and immaterial.

After argument:

Mr. FIELD: I have no intention of asking him what he wrote. It is merely for the purpose of fixing the date.

The COURT: Objection overruled.

Mr. CHILDERS: Exception.

466 A. It was about that time: I think the file will show the date.

Q. Well, now I want you to look at the file and fix the date; that is the only purpose I have to have you look at the file and fix the date?

A. (Witness examining file:) Yes, sir.

Q. And the date?

A. If the date of the paper is right, it would be on the 6th of January.

Q. State whether or not you had a conversation with Dr. Carns at his office on the day on which that story was written in which he exhibited to you a cast or skin of one of Joe Schmitt's hands and in which you said to him—

The COURT: Had you not better get that fixed before you go any further.

Mr. FIELD: This is all one question: I am bound to put it as near as I did to the witness sought to be impeached—as I can.

The COURT: Go on.

Q. In which you said to him after the exhibition of this cast that this man must have suffered terribly or some words to that effect and in which he replied to you that he didn't know about his sufferings because he was unconscious or under the influence of morphine or words to that effect?

A. I remember very distinctly being in Dr. Carns' office—

Mr. CHILDERS: Yes, or no, that question calls for.

467 The COURT: You may answer whether you did or did not have that conversation.

A. I had part of it and part of it I didn't have: that I remember of distinctly.

Q. Which part of it did you have?

Mr. CHILDERS: I object to that: The gentleman has stated the rule correctly that the question which was put to the witness sought to be impeached, must in substance be repeated to the witness, and the answer he has expected to make is yes, or no, to it.

The COURT: I think you will have to divide it up.

After argument:

Q. Did Dr. Carns in that conversation state to you that Joe Schmitt didn't know about his suffering because he was unconscious or under the influence of morphine, or any words of like import?

Mr. CHILDERS: Objected to because it is not the question which

was submitted to and asked of Dr. Carns when he was on the witness stand?

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. It is too long ago; I cannot answer that question.

468 Mr. CHILDERS: I want an answer, yes, or no.

The COURT: I cannot tell the witness what he could answer.

Mr. CHILDERS: I insist that is the answer to the question, yes, or no.

The COURT: He says he does not know.

Mr. CHILDERS: If he says that, it is all right.

Q. Didn't you make that statement to me in my office this morning?

Mr. CHILDERS: I object to that, I do not care what he stated to Mr. Field this morning.

The COURT: I think that when counsel is obviously surprised by the reply of the witness that in the discretion of the court, he can inquire.

Mr. CHILDERS: This is not an ordinary witness, but a witness introduced for impeachment, and for the sole purpose of impeachment.

The COURT: The witness can answer.

A. I told you that I was under the impression——

Mr. CHILDERS: We except to the ruling of the court.

469 A. I told you that I was under the impression and had said to the man in our office the day before that, that I thought that Dr. Carns had told me that.

Mr. CHILDERS: We object to what the witness stated to the man in his office.

The COURT: I suppose he has not finished his answer—his answer ought not to be broken in the middle. Had you finished your answer?

Mr. CHILDERS: I move to strike that out.

The COURT: I do not think that answer is responsive. The witness should answer yes, or no, whether he did or not make that statement; now counsel asks you whether you didn't say so this morning to him?

A. Well, not in those exact words.

The COURT: Whether you did or didn't say so this morning?

A. Not in those exact words.

Q. In substance?

Mr. CHILDERS: I make the same objection.

The COURT: Overruled.

Mr. CHILDERS: Exception.

470 A. I cannot answer it yes, or no.

Q. Have you talked to anybody about this case since you talked to me about it this morning?

A. No.

Mr. CHILDERS: No questions.

LOUIS BOSSERT, recalled in rebuttal as a witness on behalf of the plaintiff, testified further as follows:

Mr. FIELD: I am willing that your honor may strike out the entire testimony of the witness Beal.

Mr. CHILDERS: We do not want it stricken out. We will stand by the record as it is made.

Direct examination by Mr. FIELD:

Q. Mr. Bossert you testified here the other day that you were in the employ of the brewery company at the time of the accident to Joe Schmitt?

A. Yes, sir.

Q. How were you engaged on the 2nd day of January, 1906, after the accident?

A. After the accident, we was engaged in cleaning up about the brew house.

Q. By whose direction?

A. By Mr. Henry Loeb's direction.

Q. Whom do you mean by we?

A. Why there were three of us, Mr. Markel, Nick Trujillo and myself.

Q. Louis Merkolf?

A. Yes.

Q. Now what, if anything, did you see Mr. Henry Loeb do with reference to the safety valve on *the* that cooker after the accident?

471 A. Why, as we went up stairs, we worked our way through—we got up stairs to the cooker—he suggested that there might be something wrong with the safety valve, that it was stuck, then he himself, Mr. Henry Loeb, went up to the safety valve and took that little circular wheel off—

Mr. CHILDERS: I object to this and move to strike it out as far as it has gone.

The COURT: You better let him go on and finish it.

Mr. CHILDERS: I think the time to object is now. Mr. Loeb was not asked as to any conversation between them as to this safety valve.

After extended argument:

Mr. CHILDERS: I move to strike out what the witness said. Mr. Loeb said for the reason that no foundation has been laid for any such testimony and because it is otherwise incompetent.

The COURT: Of course, Mr. Loeb has appeared and testified as an officer of the company, and the question does not ask for what he said: I think what the witness has stated about what he said is



of no consequence so far because it simply led to what he did; so I will overrule the motion to strike.

Mr. CHILDERS: We except.

A. Mr. Loeb, he took off the circular wheel, off the lever  
472 of the valve and handed it to Mr. Markolf, and then he took hold of the lever, of the safety valve, works it up and down and stated it was in good order.

Mr. CHILDERS: We object to that and move to strike it out because the witness Loeb was not asked about that.

After argument:

The COURT: I want him to finish his answer before I rule. Is he through?

Mr. FIELD: I do not know.

Mr. CHILDERS: I make the same objection and move to strike it out.

A. Then gave orders to call the engineer and fireman and gave them orders to take down the exhaust pipe in which I took some part.

Q. If he stated any reasons for taking down the exhaust pipe, state what it was?

Mr. CHILDERS: We object.

The COURT: I will sustain the objection to that. Let us find out if he is through.

Mr. FIELD: It is all one transaction.

The COURT: You are asking another question. The other question I said he might answer and when he got through I  
473 would rule on it. Now you are asking something else which complicates it. I think you are splitting the answer of the witness by objecting. I wanted him to answer—let the jury hear his answer and then I would rule as to whether I would strike it out. I should like to have him finish his answer.

Mr. FIELD: He may have or may not have, I don't know.

The COURT: Have you finished your answer to that question, which is in effect, what, if anything, did you see Mr. Henry Loeb do?

A. I finished the answer up to the exhaust pipe.

The COURT: I want to know if he has finished; you were not asked what he said, but what you saw him do—have you finished your answer?

A. I have finished my answer.

The COURT (After argument.): The jury are not to consider what this witness Mr. Loeb said about the condition of the safety valve on the morning of the accident, or the next day—

Mr. FIELD: It was the morning of the accident.

The COURT: Whenever it was—whenever this took place.

Q. What reason did Mr. Loeb give, if any, for having the exhaust pipe taken down?

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474 Mr. CHILDERS: I object for the same reasons. Mr. Loeb was not asked about anything of the kind—we object to all this.

The COURT: I will sustain the objection.

Mr. FIELD: I offer to show that the witness in answer to this question would testify that Henry Loeb, at that time, said to these men to take down the exhaust pipe and see if it was not arrested so the steam could get out?

Mr. CHILDERS: Our objection to all this, is that it is not rebuttal.

Mr. FIELD: If that is the sole ground of objection, I ask leave to ask the question.

Mr. CHILDERS: And further, because no foundation has been laid for it, if it intended to contradict the testimony of Henry Loeb.

After argument:

The COURT: I am always disposed to let in everything on both sides that I think will help to a full understanding of the case. I will allow it on that basis.

Mr. CHILDERS: Exception.

A. Well, they have an idea that it might be stopped up.

475 Mr. CHILDERS: I object to his idea.

The COURT: I suppose he meant he said so—you can ask him what Mr. Loeb said on that subject.

Q. Well, what did he say on that subject?

Mr. CHILDERS: Objected to for the same reason, as not rebuttal and no foundation laid for it.

The COURT: I will allow it as an original question.

Mr. CHILDERS: Exception.

A. What he said about having the pipe down or having it taken down?

Q. About taking the pipe down or having it taken down?

A. He gave orders to take the pipe down to see if there was anything in there that might cause the steam—stop the steam up from going through.

Q. Was the pipe taken down?

A. He had it taken down and found clear.

The COURT: On that same basis as an original question I will let you ask him to state what he said about the safety valve. Of course, it leaves it open to reply, if you ask it as a matter of discretion.

Q. Now, the court says, you may tell what Mr. Loeb said about the safety valve that morning?

476 Mr. CHILDERS: I make the same objection, to the question as when asked before and move to strike it out.

The COURT: Overruled:

Mr. CHILDERS: Exception.

A. He said that—he took the wheel off—worked the lever up and down and said it was in good order.

Q. Was anybody brought into that room that day to examine the cooker?

A. Yes, sir.

Q. Who?

A. Mr. Jake Loeb brought in Mr. Ridley—Mr. Marron—Mr. Tierney was up there—I was right with the same gentlemen or about the same time—

Q. State what took place—I believe I won't ask that. Mr. Marron, Mr. Ridley and Mr. Tierney?

A. Yes, sir; and Mr. Jake Loeb.

Q. Came there on that day to examine the cooker?

A. Yes, sir.

Q. Now, who washed off the ceiling of that room, if anybody, that day?

A. None off the ceiling—above the ceiling—understand you mean the ceiling above the cooker?

Q. Yes, sir?

The COURT: Ceiling of the half floor, of the platform?

Q. No, the ceiling above the cooker?

A. There was none.

Q. Describe the condition of that ceiling when you went in there that day?

A. I must have not noticed anything on the ceiling—I seen it on the walls and on the lower ceilings, and everything below on the floor where the cooker stood and below the cooker, but not anything higher than the cooker.

Q. You mean the mash?

A. Mash, yes, sir; with the exception of one side where the cooker is close the wall—it was some higher—

Q. Did you, or not, go with the carriage which took Joe Schmitt from the brewery to his house on the day of the accident?

A. Yes, sir.

Q. Did you stay to see Joe Schmitt's wounds dressed?

A. Yes, sir.

Q. State what you saw?

A. I helped Mr. Schmitt, while they dressed his hands—he just put cotton on it or oil—I do not know what the liquid was.

Q. Who, if anybody, took Schmitt's clothes and how were they taken off?

A. They was cut open—ripped open and cut off—of his back—

Q. Who cut the clothes off?

A. George Abel, the engineer.

Q. What was the condition of his body when the clothes was cut off?

A. He was scalded on the knees, one knee was pretty bad, the right knee, I think, was pretty bad, and the other was not scalded very bad but the skin was off.

Q. How about his hair?

482 Cross-examined by MR. CHILDERS:

Q. How do you know he didn't know you?

A. Well, he didn't answer our questions, nor he didn't call us by name, as he did when we first came in.

Q. How many times did he call your name when you first came in?

A. He called me by name when I came in and also Mr. Fisher.

Q. I suppose when you came in he saluted you, didn't he; "How do you do, Mr. Bossert?"

A. No, not quite that.

Q. Well, what did he say by way of recognition?

A. He just asked me how I was getting along—he acted like I have seen him every day.

Q. Did he call your name?

A. He called my name.

Q. What did he say when he called your name?

A. He said, Well, Louis, how are.

Q. You never—he never had any occasion to call your name after that, did he?

A. Why, I do not know whether he did or not from the conversation which was carried on.

Q. If you call on a man that you know and he says, how do you do, Louie, he doesn't have to call you by name, does he, he can talk for two hours without calling your name?

A. Perhaps he can, yes, sir.

Q. How long were you there, thirty minutes, you say?

A. Yes, sir; about.

Q. Now, for what part of the thirty minutes did he talk to you so that you thought he understood what you said and answered the questions right?

A. Not over ten minutes, after we had placed him in bed and he turned over.

Q. You talked so hard to him, he was restless and went to bed after ten minutes.

A. He wanted to go to bed and we placed him in bed.

483 Q. You made him tired and he went to bed in ten minutes?

A. You ask me if we made him tired in ten minutes?

Q. Yes?

A. I saw we didn't make him tired.

Q. Well, you say after you had been there ten minutes, he didn't seem to understand your questions or want to talk to you?

A. Yes, sir.

Q. How do you know he didn't understand what was said?

A. Because he didn't answer any of the questions that we asked him.

Q. Did you ask him any questions which required a reply and you got no intelligent answer?

A. I do not understand that.

Q. (Repeated).

A. Yes, we asked him a question.

Q. What was one of those questions?

- A. I cannot tell just exactly what it was.
- Q. After you had been there ten minutes, he ceased to understand you?
- A. Yes, sir.
- Q. And you put him to bed?
- A. Yes, sir.
- Q. Put him to bed; he said he was tired?
- A. He was tired.
- Q. You stayed there 20 minutes longer?
- A. Yes, sir.
- Q. And kept talking to him all the time?
- A. Not myself; Mr. Fisher, part of the time.
- Q. You or Fisher?
- A. Him and I.
- Q. Did he say he wanted to go to sleep?
- A. He motioned like that and he said, I do not see what you fellows want here anyhow, why don't you go home; he said, you know I want to go to sleep—it looked kind of queer to me—Mr.
- 484 Fisher says it is nothing new, he says he is talking that way all the time; he says he don't know you now.
- Mr. CHILDERS: I object to what Mr. Fisher said.
- Q. He said I am tired and want to go to sleep and don't see what you fellows want around here anyway—that was intelligently enough, was it not?
- A. No, not for the question we put.
- Q. You understood that, did you?
- A. I understood it, whether he did, I do not know.
- Q. You don't know whether he did or not, do you?
- A. I say I understood the question—and I understood the answer but it was not the answer to the question we gave.
- Q. What was the question?
- A. I cannot exactly tell.
- Q. How do you know that he wanted to answer your questions?
- A. I have no answer for that question.
- Q. You have no answer for that question; now, how long had you been in there before you put him to bed?
- A. We put him to bed at once; when he asked us to.
- Q. As soon as you got in the room?
- A. Yes, sir.
- Q. You say he was standing up on the floor when you went in?
- A. Yes, sir.
- Q. Waiting for some of the attendants to come and put him to bed?
- A. Yes, sir.
- Q. What time of the day was this?
- A. About half past five.
- Q. Did any attendant come while you were there?
- A. They came just after we had put him to bed; one of the Sisters came in.

485 Q. What did she say to you?

A. She just said that she is coming in to put Mr. Schmitt to bed and he was already placed in bed.

Q. Then it was about time for him to go to bed, when you went there, was it not?

A. Why, I suppose he was confined most of the time to bed—he just was up.

Q. Do you know how long he had been up?

A. No, sir.

Q. Do you know whether he had been sitting up in a chair or not, or standing on the floor?

A. He was standing on the floor when I came in.

Q. He might have been sitting in the chair for all that you know?

A. I do not know.

Q. Now is it not a fact that Mr. Loebs didn't give you any order about any exhaust pipe on the second day of January, or third day?

A. I have not stated that he did.

Q. Whom did he give the order to about moving the exhaust pipe?

A. The engineer and fireman and I stated that I took part in helping to get the pipes down.

Q. You took part in the what: in taking the pipe down?

A. Yes, sir.

Q. Where was Mr. Loebs when the order was given to the engineer and the foreman about the exhaust pipe?

A. He was in the brew house with us.

Q. Did you hear the order?

A. Yes, sir.

Q. What were the names of the engineer and fireman?

A. George Abel and Manuel Sedillo.

Q. Now, you say that there was nothing on the ceiling?

A. No, there was nothing on the ceiling.

486 Q. No malt or anything or marks of steam on the ceiling—not even steam had disfigured the ceiling?

A. There was steam up there.

Q. No disfigurement or anything on the ceiling that didn't belong there before the accident?

A. No, sir.

Q. Don't you know that the marks of that mash are observable today on that ceiling?

A. If it is up there, I didn't wash it down, it is there today.

Q. You say you didn't wash anything down?

A. I didn't wash any down.

Q. You don't say there was none there?

A. I did not see any there.

Q. You don't know whether anybody else washed it off, do you?

A. I was the only one washing the walls.

Q. You were the only man: did that man Markolf help you?

A. He scrubbed the floor off and washed it and I worked on the walls.

Q. How long did you stay with the brewery after that?

A. About three months.

Q. Don't you know that when you left there that the marks of that mash on the ceiling were plainly visible?

A. I did not see any.

Q. Now, when you went to the house with Mr. Schmitt and Dr. Carns, how long did you stay there?

A. I stayed until he was in bed.

Q. Do you mean to tell this jury that Dr. Carns never took the mash out of the hair of Joe Schmitt that morning at all.

A. Yes, sir.

Q. That he left it in his hair?

A. Yes, sir.

Q. You are positive of that?

A. Yes, sir.

487 Q. Never removed it at all on the 2nd day of January?

A. Never what?

Q. Never removed the mash from his hair or head?

A. Not until he was in bed; that is all I seen of it.

Q. Had he finished dressing his injuries before he put him in bed?

A. Yes, sir.

Q. How long did you stay at the house after he got there?

A. Oh, I suppose it was over half an hour.

Q. Did you assist in dressing the injury?

A. Did I see him?

Q. Did you assist, help?

A. I helped, yes sir.

Q. You tell the jury that Dr. Carns cut off any hair on the head of Mr. Schmitt for the purpose of cleaning the malt off of his skull?

A. He didn't that morning.

Q. You mean he didn't do it while you were there?

A. While I was there.

Q. And whether he did it afterwards you do not know?

A. Not after 8 o'clock—no I do not know.

Q. After 8 o'clock?

A. I do not know.

Q. Did you leave Dr. Carns there?

A. I think we all left together, except the engineer; he stayed I think.

Q. You mean to tell the jury that a surgeon would dress injuries of that kind with the hair full of malt and go off and leave him—leave the hair with the malt in, that way; that he did do it?

A. He left it on there and stated the reason why.

Q. What did he say?

488 A. He said that malt and grits was better on and he thought it would be best to leave it on. We intended to wash it off and he stopped us; he thought it would be better to leave it on.

Mr. CHILDERS: That is all.

EUGENE WITH, a witness introduced in rebuttal on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by MR. FIELD:

Q. What is your name?

A. Eugene With.

Q. What is your occupation?

A. I am a dry goods clerk for Grunsfeld brothers.

Q. Are you acquainted with Joe Schmitt, the plaintiff in this case?

A. I am a brother-in-law to Joe Schmitt.

Q. State whether or not you saw him on the 2nd day of January, 1906, and if so where he was, and under what circumstances you saw him?

A. I seen Joe Schmitt in his house about four o'clock in the afternoon. He was all tied up and I wanted to talk to him, but he would not answer.

Q. Have you finished your answer?

A. Yes.

Q. Is that all that took place on the second of January?

A. Then I told the people who was then there in the house, two or three womans, that is no place for him, they should send him to the hospital, and I notified his brother-in-law, Mr. Zigler, to see Dr. Carns to make arrangements to take him to the hospital, and he did.

Q. When was he taken to the hospital?

A. That I do not know; the same evening, but I do not know what hour; it must have been 5 or 6 o'clock, an hour or two afterwards, I think.

489 Q. When did you next see him?

A. On the 6th day of January, in the evening, about 8 o'clock.

Q. Where?

A. In the hospital, in the San Jose hospital.

Q. What was his condition at that time?

A. He was about the same as when I seen him the first time. I asked him if he knows me but he did not answer.

The COURT: When was that?

A. On the 6th day of January in the evening, about 8 o'clock.

Q. Was he awake or asleep at that time?

A. He had his eyes open; he was all tied up, except his mouth and nose and eyes—he had his eyes open and he was suffering very heavy—and I didn't want to bother him much and didn't want to talk to him.

Q. Can you tell the jury whether or not he recognized you on that occasion?

A. I asked him if he knows me, but he didn't say. I could not say if he said yes, or no, and I could not tell on his eyes if he knowed me or not.

Q. Can you say whether or not he said anything?

MR. CHILDERS: Let him tell what he said.



A. Why, I do not know—he was talking something.

Mr. CHILDERS: Tell what he said.

A. I do not remember if he did—what he said——

490 The COURT: He asked you if he said anything?

A. I cannot remember that, if he said anything.

Q. Can you tell whether or not, at that time, he was in possession of his faculties?

Mr. CHILDERS: I object.

The COURT: I think he will have to tell what he saw; the appearances he observed.

Q. From what you saw there, could you form an opinion as to whether or not he was in possession of his faculties?

A. I do not think he was.

The COURT: You should answer yes, or no, to that; whether you formed an opinion.

A. I think he was not with himself; that he was not in his right mind.

Mr. CHILDERS: It will come out sooner or later, anyhow, I suppose.

Q. When did you next see him?

A. I seen him every day since he was in the hospital—every night, except Sundays, as a rule, I went up in the afternoon.

Q. State whether or not, at any time, while he was in the hospital, you saw anything to indicate that he was irrational?

A. I have come up one evening, I do not remember, but it was some eighth, or ninth, or tenth day after the accident happened, he seemed to be very bright—he says, did you see them two men going out of here with long green coats on; I says, no; he says, they give me \$50 in greenback-, and they laid it underneath my pillow,

491 and I said, oh, you are mistaken, I said you are dreaming; he got mad and he says, no, take it, it is right underneath, and I joshed him a little and he got worse, and I finally reached underneath, and thought I would take the greenbacks and put them in my pocket and he was satisfied; that satisfied him.

Q. You mean to say you got any greenbacks?

A. No, there was nothing there; I just did it to satisfy him. I knew the man was out of his head and I didn't want him to get angry about it. I finally reached underneath, on my right hand, and I said, I got it.

Q. You say, you don't know whether that was the 8th, 9th, or 10th day after the accident?

A. I do not know, it was a few days after I seen him the first time; then another night I have been there when there were several visitors there, the same evening, where he claimed there were two more beds in his room, and he says they put him in the wrong bed. He says that is not my bed. The—the other fellow here took my slippers, night shoes; he was very angry about that; he was very angry about that, that they put him in the wrong bed, but there was

only one bed in the room, and we had quite a time to satisfy him that there was only one bed there.

Q. You say there were several people there that night?

A. Yes, his wife was there and my wife and I do not know for sure who else was there; I think a sister was coming in at the same time.

Q. A sister, or his sister?

A. No, sister from the hospital.

Q. Now, do you know when it was, and under what circumstances that Schmitt was taken from the hospital and where was he taken?

A. Why, we was kind of afraid that we had to take the man away to an asylum and I consulted with Dr. Carns and asked him if there is anything to be done, to ask him if he didn't think that the man acts crazy always, and he said, yes, he acts a little queer once  
492 in a while, but that don't hurt him any; he asks me if there is anybody in the family who has ever been crazy or anything like that, and I told him, no, not that I know, and I asked him afterwards if we could not take him out and take him to my house, that we think he will do better and be more satisfied. It was about a week before we took him out. He says, I better leave him there a few days yet, and he told me, he says, you can take him next Sunday and I will let you know in time when he is able to get out, and I telephoned, I think it was on the 20th of January—27th I think, I telephoned to Dr. Carns, if we could take him out tomorrow. He says he will let me know in the morning and I think he didn't let me know and I went up to the hospital, and after 12 o'clock or 1 o'clock he left notice there that we could take him and send a nurse around, and we took him home.

Q. Now, was or not anything said about this man dying if he was left in the hospital?

A. Mr. Schmitt, himself, stated that if he will stay there, that he is not going to live.

Q. When did he say that?

A. It must have been after he was there a couple of weeks.

Q. To whom did he say it?

A. He told me.

Q. Now, after he was brought to your house, who took care of him?

A. The nurse what they sent along from the hospital, Tom Milet.

Q. What, if anything, do you know about it being necessary to tie him in bed?

A. Why, the first night I think it was, he was in my house, he bit all his bandages off during the night and his whole bed clothes was all full of blood in the morning, and the nurse said if he do that again, we have got to tie him up; now, I do not know if he was tied up the second, or if he let him go the second night again without; either he tied him the second night or the third night—  
493 he tied him, tied, for I seen that—every evening I went to the room and staved with him about an hour before he went to sleep, he tied him up with some shawl straps.

Q. What is the last one you used?

A. For tying him up—they tied him up with small leather straps.

Q. Where did the straps come from?

A. I had them in my house.

Q. Now, for how long did they continue to tie him up at nights?

A. It must have been something about two weeks or a little more, I could not say exactly.

Q. When, Mr. With, did you first learn that the brewery claimed that they had some paper from Joe Schmitt in settlement of this case?

Mr. CHILDERS: I object to it as immaterial.

The COURT: If this is preliminary, he can answer.

Mr. FIELD: I propose to show he did something in consequence of having obtained that information.

A. I went—Joe Schmitt requested me to go with him to Marron and ask him what he can do in—on account of that case, in making some settlement, and Mr. Marron told him that they had made arrangements, that they had paid all their expenses and that is all they will do for him; that he signed a release or some paper and they will not do anything else for him; they will not pay him; they will employ him; give him his weekly wages and he can stay in the brewery; he can go there and work, or they will employ him as long—as long as he wants to stay there. I told Mr. Marron that is not sufficient then; that if the brewery any time should sell  
494 out in the meantime, Mr. Schmitt will be out of a job and be there with his crippled hands. I went and consulted Mr. Field after this.

Q. Well, did Mr. Field tell you to do anything?

Mr. CHILDERS: I object to what Mr. Field told him.

Mr. FIELD: Question withdrawn.

Q. You don't mean to say that you came alone to consult Mr. Field?

A. No, with Mr. Schmitt. We asked Mr. Marron for a copy of that paper at that time; I remember we wanted to see it; we wanted to see the paper, get a copy, but he failed to show it to us; he didn't show it to us.

Q. Well, did Mr. Field tell you to do anything; tell Joe Schmitt to do anything?

Mr. CHILDERS: If he did it I have no objection to it.

The COURT: He can answer it.

Mr. FIELD: That is what I mean of course.

Q. Did you and Joe Schmitt go back to Mr. Marron's office in pursuance of Mr. Field's instructions and demand a copy of the paper?

A. Yes, we asked him for a copy.

Q. What did Mr. Marron say?

A. I cannot really think of it, what Mr. Marron answered.

Q. He didn't give it to you, did he?

A. No.

Q. Did anybody ever pay you for taking care of Joe Schmitt while he was at your house that month?

A. No, sir.

Q. Did anybody ever offer to pay you for it?

A. No, sir.

Q. Where did that nurse, Tom Milet, get his meals while he was there?

A. In my house.

Q. Anybody ever pay you for those meals?

A. No one whatever.

Q. Did anybody ever offer to pay you for them?

A. No, sir.

Mr. FIELD: I believe I am through with this witness but I would like to preserve the right to ask a question or two in the morning, if necessary.

The hour of 5:30 o'clock having arrived, the further hearing of this case was adjourned until tomorrow morning.

And now, on this November 4th, 1907, at 9:30 A. M., the trial of this case proceeds pursuant to adjournment.

Mr. EUGENE WITH resumes the witness stand.

Cross-examination by Mr. CHILDERS:

Q. You say you saw the plaintiff on the 2nd day of January, about 4 o'clock in the afternoon?

A. Yes, sir.

Q. Was he asleep at the time you saw him?

A. I talked to him, I asked him, and he didn't answer; I do not know whether he was unconscious or asleep; he didn't answer.

Q. You don't know whether he was unconscious or asleep?

A. No.

Q. You next saw him about eight o'clock that night?

496 A. I guess so, on the 6th of January, about 8 o'clock.

Q. That is right—was he asleep then or not?

A. He was sleeping—I asked him if he knows me and he didn't answer.

Q. I understand you to say that he was asleep?

A. He had his eyes open and I asked him if he knows me and he didn't answer.

Q. You do not know whether he was asleep or not?

A. No.

Q. How do you fix that day, the 6th of January?

A. I was trying to see him before, a couple of times, and the Sisters would not allow me to go in; they said nobody is allowed to see him and that same day my wife and his wife was there in the afternoon, and they told me I can go there now and see him, they will allow you to go in if you tell them who you are.

Q. They told you that, did they?

A. Yes, sir.

Q. Now, how do you know it was the 6th day of January?

A. It was on—I know it was the 6th day of January when I seen him the first time.

Q. Did you make any memorandum of it at the time?

A. I noted the date.

Q. Did you ever make any memorandum of it?

A. No, I did not make no memorandum; it was the same day my wife came in the first time.

Q. Now, you have to talk with your wife and sister do you, about their being up there in order to fix that date, do you?

A. No, I know the dates.

Q. That was nearly 18 months ago?

A. I was trying to see him twice after the accident happened, and I remembered it was the 6th day of January that I seen him the first time.

497 Q. Ordinarily you would not remember the date of the month on which you called to see a person who was sick, would you?

A. No.

Q. Two hours after it happened?

A. In this case I know the accident happened on the 2nd.

Q. Yes, I understand that; you have no account of the dates between the 2nd and the 6th?

A. No, I did not keep no account.

Q. Of course, you have heard that a paper or release was signed on the 6th day of January, have you not?

A. I found that out later.

Q. You found that out later; how?

A. Yes.

Q. You found out that was the date on which it was signed?

A. Yes, sir.

Q. That has nothing to do with your recollection that you were there on the 6th day of January?

A. No.

Q. You are positive of that?

A. Not.

Q. And you made no memorandum of it?

A. No.

Q. Were you there when your wife and your sister were there?

A. No.

Q. Didn't they tell you and have you not heard that it is claimed that they were there just before Mr. Marron and Mr. Jake Loeb went there with that release?

A. They have told me that—

The INTERPRETER: This juror states that there must be a little space between the question and the answer, so as to give the question and the answer.

498 The COURT: I will try to have the witness regulate it.

A. They have told me, Mr. Marron and Mr. Jake Loeb went up in the hospital after they came down.

Q. They told you that?

A. Yes, sir.

Q. And you understood that was the same day on which the release was signed—claimed it was signed?

A. That is what I think, yes.

Q. Now, you don't know that they went there at all, except what they told you, that is the only way you know it?

A. Yes.

Q. Now, you say you went there the same day that they did; that they came and told you that you would be admitted there?

A. Yes, sir.

Q. That is the only way you fixed that date?

A. Yes, sir.

Q. Now, about the 8th, 9th, or 10th you say you went there?

A. I went there every night after that.

Q. Every night?

A. Yes.

Q. Why didn't you go every night before the 6th?

A. Why, we was not allowed, the Sisters in the hospital claimed that nobody could see him.

Q. But you saw him every night after the 6th?

A. Yes, sir.

Q. What day of the week was the 6th?

A. I think it was the Saturday—Friday or Saturday.

Q. Friday or Saturday; did you go there on Sunday?

A. Yes, sir.

Q. What time of the day did you go on Sunday?

A. In the afternoon.

Q. What time of the afternoon?

499 A. About 2 or half past 2 o'clock, somewhere.

Q. How long did you stay there?

A. About an hour or an hour and a half.

Q. Did you talk to him while you were there?

A. Was trying to, yes sir.

Q. Did he answer your questions?

A. No.

Q. Didn't he know you?

A. No.

Q. Never know you?

A. No.

Q. Did you try to talk to him during the whole hour and a half that you were there?

A. No, sir.

Q. Was he asleep while you were there?

A. Yes, sir.

Q. Most of the time he was asleep, or all of the time, which?

A. Most of the time.

Q. He was awake part of the time?

A. Yes, sir.

Q. And he didn't recognize you?

A. No, sir.

Q. You are positive of that are you?

A. Yes, sir.

Q. When did you go there the next time?

A. Monday night.

Q. How long did you stay then?

A. As a rule I stayed there half an hour or an hour.

Q. Did he recognize you on Monday night?

A. Why, I cannot tell exactly if he did; some times he called my name and sometimes he didn't.

Q. Sometimes; what do you mean that sometimes he talked to you without calling your name, and sometimes he called your name; is that what you mean?

(A juror here made a remark.)

500 The COURT (to interpreter): What did the juror say?

The INTERPRETER: He says they have difficulty in hearing because they all talk at once.

The Court thereupon instructed the witness to wait until the question was interpreted before answering.

A. There were times when I went there—when I asked him; I says, Joe, you know me? and he says, yes; other times he didn't talk.

Q. Didn't answer?

A. Yes.

Q. He mentioned your name while you were there, did he?

A. I told him my name; I asked him if he knows me.

Q. What did he say?

A. At times he said, yes.

Q. Was there any time when you asked him if he knew you that he didn't say, yes?

A. He didn't answer many times when I asked him that question.

Q. Was he asleep when he didn't answer?

A. No; there was times that he had his eyes open.

Q. Do you know that he heard you when he didn't answer?

A. That I do not know.

Q. Did you carry on a general conversation at any time on any subject?

A. No, sir.

Q. Did you discuss his injuries, and the way the accident happened at any time?

A. Yes, sir; I was afraid to talk to him any length of time on account of him suffering.

Q. Then it is a fact that you were afraid to talk to him, and didn't talk to him much?

501 A. I was not afraid to talk to him, but didn't want to hurt the man to answer my questions—that it would hurt him to talk.

Q. When I used the word afraid in my question, I did not mean afraid of any injury coming to you, but I meant you were afraid of troubling him or distressing him in some way?

A. Yes, sir.

Q. It is the fact that you didn't like to talk to him much for that reason?

A. Yes, sir.

Q. And you didn't try to talk to him much?

A. No.

Q. You do not know whether he could have understood you if you had read a whole page of paper over to him about a business matter, or not, do you, taking the care and pains to see that he heard and recognized all the words that were used; you do not know that?

A. I am pretty sure that the man didn't care for any conversation of that kind like that in that suffering stage.

Q. That is simply a matter of opinion of yours?

A. I think that—

Q. Wait a minute; I had not finished my question. That is simply a matter of opinion of yours and not any matter of absolute knowledge on your part, that he could not have understood a page of paper read to him, care being taken that he could hear each word as it was uttered?

A. Why, my opinion is that a man in that stage, about dead, or three-fourth- dead, like the man was, that he didn't care or pay attention—if any paper was read to him, or if I would read any story to him—that is my opinion.

Q. That is exactly what I am getting at; it is only a matter of opinion on your part?

A. Yes, sir.

Q. That is right, is it?

A. That is my opinion.

502 Q. You do not undertake to tell this jury that he may not have heard read that release, which you have heard read here, on the 6th day of January, and understood every word of it?

A. No; I am pretty sure that the man was not in a stage to understand it.

Q. But that is a mere matter of opinion?

A. Well, I think it takes a doctor or expert to understand that better than I could.

Q. But you do not undertake to swear positively to this jury that Joe Schmitt was not capable of understanding that paper when properly read to him for the purpose of making him understand it, on the 6th day of January, 1906?

A. Yes; I am certain he was not.

Q. Except as a matter of opinion?

A. I am certain that he was not.

Q. But that is a mere matter of opinion; that is the only way that you know anything about it; it is a mere matter of opinion with you?

A. I think that everybody—not with me—but any man will.

Q. You were not there on the 6th day of January when it was read to him; when it is said to have been read to him?

A. I have not been.

Q. You were not, were you?

A. No.



Q. Then it must necessarily follow that when you say that he could not have understood that paper on the sixth, that is purely a matter of opinion of yours?

A. Yes, sir.

Q. You were there every night, for how long?

A. As long as he was in the hospital, except Sundays, I went in the day time.

Q. Now, when did he begin to recognize you and talk rationally?

When did he begin to talk rationally to you?

503 A. I think it is something like two weeks after he was in the hospital.

Q. That would make it about the 16th then, of January?

A. I could not swear to the dates; something around there.

Q. If you went there on the 2nd that would make it about the sixteenth?

A. About around there; I could not be certain of any dates.

Q. He had not recognized you up to the 16th except on the occasion you have just mentioned, awhile ago?

A. Except on the—I could not mention any dates; I said about.

Mr. FIELD: I object to the question, because the witness did not testify to that—to any occasion.

Q. Didn't you testify that he recognized you on the 8th, 9th or 10th?

A. No.

Q. When was the first time that he ever recognized you?

A. I cannot tell the date exactly, but I think it was about two weeks after the accident.

Q. He never recognized you until about the middle of January, the 16th or 17th of January?

A. Yes, sir.

Q. Well, what did he say to you then?

A. He didn't say anything—that he was trying to go home—he says that they are killing me right here and I want to go away—he didn't call it hospital—he never mentioned—he didn't know where he was—he called it hotel—he didn't know he was in the hospital.

Q. Now, did you carry on a general conversation with him  
504 then?

A. I told him if he was able to go out, we will take him out.

Q. Did you speak to Doctor Carns about it then?

A. Yes, sir.

Q. Did I understand you in your direct examination to say that you did not say anything to Doctor Carns about it until about the day that he was removed from there?

A. I told Doctor Carns, and he says the man is not able to be removed, but I will let you know the time when you can take him.

Q. That was about the middle of January, 16th or 17th, along there you think—about that time?

A. Yes, sir.

Q. He was not removed from there until the 28th of January?

A. No, sir.

Q. Did you continue your visits to him after—up to the 28th of January—daily visits?

A. Yes, sir.

Q. And did you talk to him during that period of time?

A. Very little.

Q. Was he responsive to what you said to him?

A. At times he did not.

Q. How long did you stay; about how long on these visits, after that time?

A. A half an hour, or three-quarters of an hour to an hour.

Q. Anybody there with you on these visits?

A. At times.

Q. Who?

A. Mrs. Schmitt went up occasionally, two or three times a week, with me—and there is some other friends of his come in and stood a few minutes, and went out—I cannot think of the names now.

Q. The Sisters did let his outside friends in to see him—outside friends—not members of the family?

A. Not—after the ten or some odd days were over with,  
505 yes.

Q. After the ten days were over the Sisters let in his friends who wanted to see him; is that the fact or not?

A. Yes, sir.

Q. Let them go in and talk to him if they wanted to, and some of them did go in and talk to him when you were there?

A. Yes, sir.

Q. Now, with reference to the fifty dollars in greenbacks; when was that occurrence; when did he say that to you?

A. I do not remember the date; it was in the first few days—the first days I went up there. Was about—must have been about the 10th, 9th or 10th, somewhere around there.

Q. Had there been anybody in there just before you went in when he told you that about the fifty dollars?

A. I do not know.

Q. He said that two fellows had been in there and left fifty dollars in greenbacks?

A. Yes, sir.

Q. And that he had it under his pillow?

A. Yes.

Q. Did he have any trouble in articulating in telling you that?

A. No.

Q. He could speak, what he did say easily, could he?

A. He looked wild—his eyes.

Q. I did not ask you about his eyes; I asked you about his articulation?

A. Yes, sir; he spoke plainly.

Q. He had no difficulty in choosing his words?

A. Not that I can remember.

Q. He told you that he had fifty dollars under his pillow?

A. Yes, sir.

506 Q. I understand you to say that he seemed to be angry with you because you didn't seem to agree with what he said.

A. Yes, sir.

Q. Then you put your hand under there and pretended to get it in order to satisfy him?

A. Yes, sir.

Q. You didn't show him any money did you?

A. No, sir; there was not any there.

Q. Was he satisfied?

A. Yes.

Q. That satisfied him?

A. Yes, sir.

Q. Did he go off to sleep then?

A. Yes, sir.

Q. Or was he awake all the time you were there?

A. No; he went to sleep.

Q. How long were you there on that occasion?

A. About an hour, I think.

Q. How much of that time was he asleep and how much of the time was he talking about these fifty dollars under the pillow?

A. I should judge from five to ten minutes.

Q. You mean that he was asleep from five to ten minutes?

A. No; he was talking to me about the ten dollars and explained to me about the man—about the green coats.

The Court: You said ten dollars?

A. Fifty dollars.

Q. He was talking to you about that for five or ten minutes?

A. Yes, sir.

Q. And the balance of the time he was asleep?

507 A. No; he seems to be queer; he was talking queer—he was not sleeping when he was talking to me.

Q. Would he drop off to sleep suddenly, or would you have to cease conversation to give him a chance to go to sleep; would he fall to sleep gradually?

A. That I do not know; I do not know if he fall down to sleep quick, or if he keep up for a while.

Q. He could not sleep while you were talking to him, could he?

A. No; he didn't answer any questions.

Q. Now, once you were there and you say he said there were two beds in the room, and that they had him in the wrong bed; when was that?

A. That was a few days after this; I do not know exactly the date—three beds in there he said.

Q. He said there were three beds?

A. Yes.

Q. Now this greenback business. I do not know whether I have the date; could you fix the date?

A. No; I could not.

Q. Was that the 8th, 9th or 10th?

A. Somewhere along there.

Q. Now, how many days after that was it when he spoke to you about the three beds in the room?

A. I do not know; I judge probably a week afterward.

Q. And he said that there were three beds in the room when there was only one?

A. Yes, sir.

Q. And he was in bed at the time?

A. Yes, sir.

Q. He said they had put him in the wrong bed?

A. Yes, sir.

Q. What time of the day was this?

A. About eight o'clock at night.

Q. Anybody there?

A. Yes.

Q. Who?

A. My wife.

Q. Your wife was with you?

508 A. Yes, sir.

Q. Anybody else?

A. Mrs. Schmitt.

Q. None of the Sisters were around there were there?

A. Yes, sir.

Q. Did you ever ask the Sisters how he was getting along, and how he was doing?

A. Yes, sir.

Q. Did you say anything to the Sisters about this greenback business?

A. Yes—

Q. And the three beds?

A. Yes, sir; I think I did.

Q. Which Sister did you say that to?

A. I do not remember the name; the Sister who nursed him.

Q. The Sister who was nursing him?

A. Yes, sir.

Q. Now, they took him to your house on the 28th day of January, did they not? That was the exact date, was it not?

A. Yes, sir; I think so.

Q. Now, the first thing, you say when he was there he bit off—First; when was it that you applied to Doctor Carns with reference to taking him to your house? Fix the date as near as you can?

A. It was on the Sunday—it must have been two weeks before we taken him home—it must have been two weeks after the accident.

Q. And that was about the time that he was telling you about the greenbacks under his pillow and the three beds in the room, was it not?

A. Yes; it must have been around there; about the greenbacks, that was on the first days—the very few first days that he was up there.

Q. The first day you were there, as I understand, was the sixth?

509 A. Yes; I mean the first days—not the first day; one of the first days.

Q. The first days that you were there?

A. Yes; the first days that I was there.

Q. You do not know whether this was the 6th, 7th, 8th, 9th or 10th; this about the greenbacks?

A. That was not on the first times; about the 9th or 10th; somewhere about there.

Q. When did he speak to you about the three beds?

A. About the middle of the month; somewhere around there.

Q. And that is about the time that you spoke to Doctor Carns about taking him away?

A. Yes.

Q. And Doctor Carns told you that he better stay there a little while longer?

A. Yes, sir.

Q. Was that all you said to him? Was that all he said to you?

A. No; we asked him—that the man is very queer—that he is out of his head.

Q. You told Doctor Carns that he is out of his head?

A. Yes, sir.

Q. And he said that he would have to stay there a little while longer?

A. I asked him if he didn't see that—that is, his physician.

Q. If he didn't see that?

A. Yes.

Q. What did Doctor Carns say?

A. He say he act queer once in a while, and that he will be better later on—he will get over that.

Q. He gets queer once in a while, but he would be better after a while?

A. He gets over that; yes, sir.

Q. Now, when and where did you tell that to Doctor Carns, and when and where did he say that?

510 A. In the middle of the month when I was in his office.

Q. In Doctor Carns' office?

A. Yes.

Q. Was anybody present?

A. Mrs. Schmitt.

Q. Mrs. Schmitt went with you to Doctor Carns' office to see about removing him?

A. Yes, sir.

Q. That was about the middle of the month?

A. Yes, sir.

Q. Anybody else present but Mrs. Schmitt?

A. Not that I can remember.

Q. Now, when he was removed who took him there; how was he taken?

A. He was taken in a hack.

Q. In a hack?

A. Yes.

Q. You don't know who drove the hack?

A. No; I do not.

Q. He simply walked and got in the hack and was driven down to your house—walked down the steps?

A. No, sir; took him down on the elevator.

Q. There is an elevator in the hospital?

A. Yes.

Q. The elevator does not run up and down does it after you reach the first floor. He walked down out of the building and got in the hack, didn't he?

A. No, sir; he took the elevator from the floor, where he was, and two men held him, and lead him on the alley-way and lead him down.

Q. Who were the men?

A. That is Tom Milet and Alphonse Goebel.

Q. Where is he?

A. He left Albuquerque; he is in El Paso.

Q. Did they support him when he went down the steps and got in the hack, or did he get in alone?

511 Mr. FIELD: I object. He said he did not go down alone, but went down in the elevator.

Mr. CHILDERS: I do not care about that.

A. The elevator goes down to the carriage way—the carriage stood on the back part of the hospital and there is where they brought him in.

Q. The elevator goes down to the ground floor?

A. Yes.

Q. And you got out of the building on the level with the ground; that is what you mean to say?

A. Yes.

Q. Then, the elevator does not run out of doors, does it?

A. No.

Q. Who supported him from the elevator to the carriage?

A. These two men.

Q. Did they go with him to your house?

A. Yes.

Q. Both of them?

A. Yes, sir.

Q. You got in the carriage, four of you?

A. Yes.

Q. Was anybody else in the carriage?

A. Goebel, myself and the nurse.

Q. Milet, the nurse?

A. Yes, sir.

Q. Now, on the way down did he talk any?

A. No, sir.

Q. Never said a word?

A. He seems to me to be out of his head when we took him in the carriage.

Q. Do you know whether Doctor Carns had seen him that day or not?

A. I think he did, but I ain't sure.

512 Q. Now, when he got to your house that night you say he bit the bandages off his hands?

A. Yes, sir.

Q. Pulled them off with his teeth; is that what you mean?

A. Yes.

Q. Did he talk any during those few days that he was at your house?

A. I have not been at home in day time; I do not remember what he done those days.

Q. Did he sleep at night and stay awake in the day time?

A. I do not know; I did not stay much with him at any time.

Q. You don't know much about him then after they took him to your house?

A. No.

Q. Except what you may have been told?

A. I seen him in the evening—went in and stood with him a little while, and let him alone.

Q. Now, when did he begin to talk with you? When did he begin to talk to you as if he was at himself?

A. There was times, yes, where he asked you very plain questions and at times he didn't.

Q. Did he crave beer while he was there?

A. I think he did.

Q. Didn't you give him a good deal of beer?

A. The nurse did.

Q. All the beer that he wanted?

A. As I remember that he didn't care much for it.

Q. I thought you said that he craved it?

A. He drank it with a tube.

Q. With a tube?

A. Yes.

Q. There was nothing the matter with his mouth was there?

A. I guess it was.

513 Q. The heat of the malt had not penetrated his mouth; he was not burnt internally in any way, was he?

A. I do not know. I do not think he was burnt inside of the mouth, but the lips and the mustache was.

Q. I have asked you about how soon after you took him to his house he began to talk to you rationally, as if he was at himself? I mean continuously; I do not mean spasmodically?

A. I do not think hardly any time that he was in my house, that he was very clear, that he talks like he did before.

Q. He does not talk like he did before yet, does he?

A. I do not know.

Q. You do not know?

A. I do not know; I do not think he is clear yet.

Q. You do not think he is at himself yet, do you? That is your opinion?

A. Yes, sir.

Q. Now, Doctor Carns continued to visit him at your house, didn't he?

A. That is what I heard; I never seen him.

Q. And this nurse stayed with him all the time he was there, this man Milet?

A. Yes, sir.

Q. You say these straps were put on him for the purpose of holding his hands down so he could not get them to his mouth when he was asleep?

A. Yes, sir.

Q. They were small shawl straps?

A. Yes, sir.

Q. They inflicted no pain, putting them around his wrist; I suppose they did that that way did they?

A. I do not think so.

Q. Where did they put them?

A. Around this part here—below the elbow.

Q. And I suppose fastened that strap up to the railing of the bed?

A. Yes, sir.

514 Q. He could go to sleep with those straps on—would he not?

A. I do not know.

Q. You do not know; did you ever see the straps on him?

A. Yes, sir.

Q. Well, you know whether he slept or not don't you?

A. Well, after he strapped him—he didn't strap generally until everybody went to rest, until everybody retired.

Q. In other words, he never strapped him until he thought Schmitt wanted to go to sleep—it was necessary to strap him?

A. Not—Mr. Schmitt never asked him to strap him, but the nurse says I have to strap you or your hands will never get well. Mr. Schmitt didn't want to be strapped.

Q. The nurse didn't do it until Schmitt was ready to go to sleep or the nurse thought he ought to go to sleep, and did it simply for the purpose of preventing him from pulling the bandages off with his mouth?

A. Yes, sir.

Q. When he was supposed to be awake he didn't keep any straps on him then, is that the fact?

A. In the day time?

Q. In the day time didn't keep any on?

A. No.

Q. You testified here that you received no compensation for the care of Schmitt while he was at your house and no compensation for the meals of this man Milet, who was nursing him; did you ever ask for any?

A. No, sir.

Q. Do you know whether the brewery company knew anything about it?



A. I think they ought to know it; they never asked me if they owe anything.

Q. They never refused to pay you?

515 A. No, sir; I never asked them.

Q. Now, you went up to Mr. Marron's office with Mr. Schmitt; when was that?

A. Some time in March—I do not remember.

Q. It was in March, was it not about the latter part of March, probably the last day, along towards the 30th or 31st of March?

A. Must have been latter part of March.

Q. And Mr. Marron informed you and Mr. Schmitt about the release when you were there?

A. Yes, sir.

Q. He told you what was in it, didn't he?

A. No, sir.

Q. You stated yesterday——

A. No, he didn't tell us what was in it, no, sir.

Q. What did he say to you?

A. He said that Mr. Jake Loebs, he will do whatever he says, and Mr. Marron says you do not need no paper that Mr. Jake Loebs' words is just as good.

Q. You didn't need any paper, that Mr. Jake Loebs' word was just as good?

A. Yes, sir.

Q. Who said that?

A. Mr. Marron.

Q. That was the reason that he didn't give you a copy of the release?

A. That I do not know.

Q. That is the reason that he assigned for it; that is the reason that he told you that he didn't need any paper, that Mr. Jake Loebs' words is just as good, is that what he told you?

A. That is what he told me.

Q. He told you that that paper stated or provided that they would pay all the expenses of the sickness incident to the injury; that they could continue his wages as if he was well, and that he could continue in the employment of the company, didn't he?

A. That is what he said.

516 Q. And that in consideration of that he had agreed not to make any further claim against the company; Mr. Marron told you that in substance, didn't he?

A. That is what Mr. Marron said.

Q. And you understood that?

A. Yes, sir.

Q. And Mr. Schmitt understood it, didn't he?

A. He said it, but he says he don't know anything about a paper.

Q. But he understood what Mr. Marron said?

A. I think so.

Q. He was at himself enough then to know what that was, was he not?

A. I think so.

Mr. CHILDERS: That is all.

Redirect examination by Mr. FIELD:

Q. Did you say Mr. Marron told you what was in that paper?

Mr. CHILDERS: I object to that; I do not think it is proper re-direct.

A. No, he didn't; Mr. Marron told us what they were going to do.

Q. Did Mr. Marron at that time pretend to tell you what was in that paper?

A. No, sir; we asked him for it and we wanted to see it and he refused to show it to us.

Q. And the things that Mr. Marron said that the brewery was willing to do——

Mr. CHILDERS: I object to that as leading.

517 Q. —Were said in response to your statement that you wanted a settlement?

Mr. CHILDERS: I object to that as leading.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. Yes, sir.

Q. And to that you replied it was not enough?

A. No, sir.

Q. What?

A. That it was not enough, that is what I mean; was not sufficient; he was not satisfied.

Q. Now, that carriageway up at the hospital runs right to the elevator door, does it not?

A. Yes, sir.

Q. And is so arranged that you can drive an ambulance up there and take a stretcher out of it into the elevator, is it not?

A. Yes, sir.

Mr. FIELD: That is all.

The COURT: I want to ask a question; I think there is one question that Mr. Childers objected to as leading in form. I think it was harmlessly so.

Mr. CHILDERS: An objection because a question is leading is not worth much in appeal or anywhere else.

518 The COURT: I want to ask the witness one question myself.

Examined by the COURT:

Q. When Mr. Marron was talking to you, did he have what he claimed to be the release in his hand at any time?

A. I do not know; we asked Mr. Marron to let us see it, the release.

Q. What I asked you was whether he had in his hands as you were talking or appeared to be reading from any paper which he said was the release?

A. No, sir.

Q. Whether you saw what he said was the release?

A. No, sir; I never seen it.

Mrs. JOSEPH SCHMITT, recalled as a witness in rebuttal, in behalf of the plaintiff, testified further as follows:

Mr. FIELD: This witness has been on the stand before.

Q. Mrs. Schmitt, did you see your husband at the brewery on the morning of the accident, after the accident?

A. Yes, sir.

Q. Did you go with him in the carriage from the brewery to your house?

A. I do not understand that.

Q. I will have to get near the witness. Did you go in the hack with your husband and the doctor and Louis Markolf from the brewery to your house?

A. Yes, sir.

Mr. FIELD: I think it was Abel instead of Markolf.

519 Q. Did your husband, going from the brewery to your house, tell Dr. Carns how the accident happened?

A. No, sir.

Mr. CHILDERS: I did not understand whether she said yes or no.

Mr. FIELD: She said no.

Q. What did you say about your husband having told Dr. Carns how the accident happened going home in a carriage?

A. Why, Mr. Schmitt could not talk; he had the chills too bad, and there was Mr. Bossert, he was setting with the hack driver, and Mr. Louis Markolf had Mr. Schmitt on his lap, and he—I and the doctor was inside of the hack, but he didn't talk anything about the accident.

Q. Now, when you got home, what, if anything, was done by Dr. Carns about your husband's hair?

A. Nothing at all.

Q. Well, what happened to your husband's hair afterwards?

A. I was never there when they fixed his hair.

Q. Up to the time that he was taken from your house to the hospital nothing had been done to his hair?

A. No, sir.

The COURT: Is there any doubt about the time he was taken to the hospital?

Mr. FIELD: They said the same afternoon; they have not fixed the hour, I believe.

The COURT: That is something about which there is no dispute.

520 Mr. CHILDERS: Not about the dates. It clearly appears, I think, that it must have been about 5 or 6 o'clock.

Q. Did you visit your husband at the hospital?

A. Yes, sir.

Q. When did you first see him at the hospital?

A. The second day after the accident.

Q. Who was with you?

A. Mrs. With.

Q. In what condition was he when you saw him?

A. He didn't know me at all.

Q. How long did you stay there?

A. I didn't stay there long, because the Sister said we should not bother him much; not talk so much.

Q. Did he recognize Mrs. With?

A. No, sir.

Q. Well, when you came out, on that occasion of his room, did you see anybody going in?

A. Yes, sir.

Q. Who was it?

A. It was Mr. Jake Loeb and Mr. Marron.

Q. What, if anything, did you or Mrs. With say to the Sister about letting Mr. Loeb and Mr. Marron go in there?

A. Why, Mrs. With made the remarks, that it was funny that first when we asked, we could not go in, would not let me in, his wife; I said, I go in anyway, because I want to see him, and after we went out there was Mr. Marron and Mr. Jake Loeb went in, and we thought it was kind of funny.

Q. Now to what Sister did you make that statement?

A. Why, I do not know the name of the Sister, but I know her face when I see her.

Q. When did you next see your husband at the hospital?

A. It was Sunday afternoon.

Q. The following Sunday?

521 A. I guess it was one evening—Mrs. With and I went up.

Q. What Sunday was that?

A. It was the first Sunday.

Q. What was his condition then?

A. I talked to my husband and the first time he seems to know me and then all at once he talked about—talked out of his head again.

Q. When did you next see him?

A. One evening of the week.

Q. Who were there then?

A. Mr. With and I.

Q. What happened at that time?

A. He was asleep, and Mr. With says not to wake him up; I said if I come up here I want him to know that I was here; I just touched him a little and he woke up, and we said, hello, and he looked at us so funny. All at once he jumped out of the bed and he looked for his slippers, and he said it was not his slippers, he said it was not his room, either he said it was No. 3, and he talked about a red-headed fellow.

Q. Now, go on and tell all that happened, as you remember it; what did he say about the red-headed fellow?

A. He didn't say much about him; he said that it was that red-headed fellow that got his room, and Mr. With put him back to bed again.

Q. Was that all?

A. Yes, sir.

Q. Well, when did you next see him?

A. It was on the 2nd Sunday—on the 3rd Sunday, I guess.

Q. Well, what happened then?

A. Why, there was Dr.—I was not up there long when the Sister sent me down because the Dr. come to dress his hands.

Q. How was he at that time?

A. He walk around, he had his hands up and he always  
522 said, my hands, my hands, I wish I had my good hands again.

Q. How long was it, Mrs. Schmitt, after this accident before, from your observation, you can say that your husband was in his right mind?

Mr. CHILDERS: I object to the question because it is incompetent.

The COURT: Overruled.

Mr. CHILDERS: Overruled.

Q. Will you answer my question?

A. About 4 months.

Q. What did you say?

The COURT: Repeat the question.

Q. (Repeated.)

A. After he was home—you mean after he was home?

Q. At any time?

The COURT: Let the question be read again.

Q. How long was it, Mrs. Schmitt, after this accident before, from your observation, you can say that your husband was in his right mind?

A. It was about 2 months.

Q. Do you mean to say that he was not rational at any time during that period; do you understand that question?

A. I do not understand it.

523 Q. Do you mean to say that he was out of his head all the time for 2 months?

A. No, sir.

Q. Well, just what do you mean; do you mean that sometimes he was out of his head?

A. It was six weeks; I could say that most of the time he was not in his right mind.

Q. Have you any children, Mrs. Schmitt?

Mr. CHILDERS: I object to that as immaterial.

A. I have 4 children.

The COURT: How is it material?

Mr. FIELD: I think the jury should be excused a moment.

The jury was thereupon excused and the following testimony taken, to be ruled upon by the court and given to the jury if admitted.

Q. Have you any children, Mrs. Schmitt?

A. Yes, 4 children.

Q. What kind of hands have they got; any crooked hands—have any crooked hands?

A. They have straight hands, just like me.

Thereupon the jury returned to the court room.

Cross-examined by Mr. CHILDERS:

Q. You say the first visit you paid to your husband after he went to the hospital was the next day after he was removed from your house?

A. Next day——

524 Q. Did you go to the hospital the day after the accident, the first time, did you go up to the hospital on the 3rd day of January?

A. The 2nd day.

Q. The accident was on the morning of the 2nd, was it not?

A. Yes, sir.

Q. And you went up to the hospital then on the 4th day of January?

A. Two days after.

Q. Two days after; is that the time that you saw Mr. Marron and Mr. Loeb's?

A. Yes, sir.

Q. Then the next time you went up there was on Sunday, afterwards?

A. Yes, sir.

Q. And on that day you say he recognized you when you first went in; he knew you when you first went in?

A. Yes, sir.

Q. You went up with Mr. With at that time?

A. The second Sunday.

Q. Was it the first Sunday or the second Sunday you went with Mr. With?

A. First Sunday.

Q. Was that the time he spoke about his slippers and said that was not his room, No. 3, that was No. 3, and that was a red-headed man's room?

A. Yes, sir.

Mrs. E. WITH, recalled as a witness in rebuttal, in behalf of the plaintiff, testified further as follows:

Direct examination by Mr. FIELD:

Q. You have already testified you are a sister of Joe Schmitt?

A. Yes, sir.

525 Q. State, Mrs. With, when was the first time that you saw the plaintiff at the hospital after the accident?

A. It was two days afterwards.

Q. What time of the day was it?

A. In the afternoon, about 2 o'clock.

Q. What was his condition?

A. He didn't know us at all.

The COURT: What day was that?

Mr. FIELD: She says two days afterwards.

Q. When you came out of the room, did you see anybody go in?

A. I and Mrs. Schmitt and the Sister was standing a couple of feet on the other side and Mr. Marron and Mr. Jake Loeb came up from the stairway and went directly into the room.

Q. What, if anything, was said by you or Mrs. Schmitt to the Sister about Mr. Loeb and Mr. Marron being allowed to go into the room?

Mr. CHILDERS: I object to what was said to the Sister as irrelevant, immaterial and incompetent.

Mr. FIELD: I think the objection is well taken.

Q. When did you next see your brother in the hospital?

A. Sunday afternoon.

Q. What time?

A. In the afternoon; I do not know, it was about 2 or 3 o'clock, I could not tell the hour it was.

Q. What was his condition then?

A. He was in the same condition I saw him the first time.

526 Q. When did you next see him at the hospital?

A. Some times during the week, in the evening.

Q. Do you know how often you went there?

A. I went there every Sunday and through the weeks once.

Q. State if you can when it was after he was placed in the hospital that he was first able to recognize you, or that he did first recognize you?

A. I do not know, I could not tell when he recognized me because his wife was always with me and she wanted to talk to him, and he never asked who I am, and he never talked to me, and when I asked him how he feels many times he did not answer me at all.

Q. Well, can you state whether or not at any time he did recognize you while he was at the hospital?

Mr. CHILDERS: I think that is impossible for her to state—I object to the question as incompetent; she can testify what he said or didn't say, or did: it is for the jury to say whether he recognized her or not.

The COURT: Overruled.

Mr. CHILDERS: Exception.

A. He didn't recognize me: I do not think he did, because he never asked me, and he never call me by name.

Q. You heard the testimony of your husband on the stand here this morning about an occasion when he claimed he was in the wrong bed?

A. Yes, sir.

Q. Were you present at that time?

A. Yes, sir.

Q. Tell what occurred, as you remember it?

527 A. I came in the room and he was kind of a sleep and I told his wife not to wake him up, and she said she wanted to see him and wanted to talk to him when she is coming up to see him, so she just touched him and he jumped out of the bed, then he took the slippers, threwed them under the bed and said they were not his slippers, then he looked around in the room and he says he is in a different room altogether, this is not his bed at all: we asked him who changed him, and he said he did not know, but that belongs to the red-headed man: so I made him believe—we made him believe he was in another room, and then he was satisfied and my husband put him back in bed: we let him rest then.

Q. You know when that was?

A. Well, I think it was the first part he was up in the hospital. I think it was about the 9th or 10th. I could not tell exactly the time.

Q. What happened to your brother's hair after the accident?

A. I could not tell about his hair except what Tom Milet told me.

Q. I don't want what Tom Milet told you?

A. After he came in my house—before, I didn't see him till he was in the hospital two days afterwards, and I didn't see him in his house at all.

Q. When you saw him in the hospital did he have his hair?

A. I could not say anything because his head was all tied up except the eyes and the mouth.

Q. Well, when he came home to your house, what kind of hair did he have?

A. Then the head was tied up on one side yet, and then he was there for about a week, then they washed the hair good and cut all his hair off. Tom Milet told me that the first day——

Mr. CHILDERS: I do not want that.

528 Q. I do not want to know what Tom Milet told you?

A. I know that they washed the hair—that it was on yet. The head was stopped where the hair came out: he had to cut it entirely.

Q. What do you mean by the head being stopped where the hair all come out?

A. I guess he was scalded by that; the whole head was stopped. Something like my face: had no hair on it at all.

Q. You say the whole head had no hair on it, or in some places had no hair?

A. Some places: he didn't have no hair on it, and some places the new hair come out—said he had to cut it all off entirely——

Q. How long was this after the accident?

A. I guess it was about 5 or 6 weeks afterwards.

Q. How long was it after the accident Mrs. With before your brother was in his right mind?

A. I know it was for eight weeks he never was in his right mind.

Q. When he was brought to your house, what if anything, was done to keep him in bed at night?



A. They strapped him down with shawl straps.

Q. Why was that necessary?

A. Because he bit in his hands so the next morning everything was bloody and the whole skin and everything came off again.

Cross-examined by Mr. CHILDERS:

Q. You say that the reason that they strapped him down was he was biting the bandages off and that the skin would come off his hands?

A. Skin—he didn't have skin off——

Mr. FIELD: There is one question that I neglected: I am not sure whether she testified before about his hands being worse after he went to Dr. Carns' office and I want to ask about that.

The COURT: I think she did.

Mr. CHILDERS: She testified something about his catching cold I think.

Mr. FIELD: Did you testify about his catching cold in his hands?

A. Yes, sir, I think.

Mr. FIELD: That is all right.

Q. The skin was in process of formation, the loose skin on his hands?

A. What did you say?

Q. The new skin was in process of formation, was forming.

A. I do not know, he bit off the flesh; not the skin was not on it then.

Q. It was growing there was it not?

A. No, it was not, his hand was all just one flesh.

Q. It was not granulating?

A. I know what you mean, it was not at that time, the first week he came in my house.

Q. When he came in your house that had not commenced?

A. No, sir.

Q. How long was it after he got there that the skin did begin to grow on?

A. About the second week it started in a little on the hands, up here (indicating).

Q. Now, you state the bed was bloody in the morning?

530 A. Yes, sir.

Q. His hands would bleed when he pulled the bandages off?

A. Yes, the next morning the whole bed was full of blood.

Q. The blood didn't come from anywhere else but his hands, did it.

A. No, sir.

Q. Now, you say his hair was cut off five or six weeks after the accident?

A. The old one, what was on it.

Q. When did they cut it off now?

A. The hair was stopped.

Q. When did they cut his hair off?

A. That is about six weeks after the accident.

Q. All his hair was not cut off then until six weeks after the accident?

A. The new one that came out on the spots (or stops)—There was some other spot (or stop) on it had no hair on it at all.

Q. Some of the hair in spots had been cut off before he had come out—what do you mean—

A. When the hair came off, he was scalded, they cleaned it in the hospital, that was on the old spots (or stops) which they could not take off—they cleaned that in my house, then some spot (or stop) or it that had no hair on it at all.

Q. Well, we could get along much better Mrs. With if you would answer my questions, as I ask them: When they brought him back to your house, the hair was only gone on spots on the head?

A. The first two weeks—the first week I did not see the head at all because it was tied up.

Q. I mean when you did see it at your house, it was only gone in spots?

A. In spots it didn't have one hair on it.

Q. Some spots didn't have any hair on it at all?

A. No, sir.

Q. Now do you know whether the hair on those spots had come out itself or whether it had been cut off?

531 A. What was that—I do not know about that.

Q. Did it come back again at any time, all over his head?

A. We gave him some medicine and Tom Milet rubbed it every morning.

Q. And all his hair came back again?

A. Not all.

Q. Is it not all back there now?

A. I guess afterwards, it came back, he had spots left after he left my house.

Q. When did it come back?

A. I do not know: I never looked on his head after that.

Q. Then after he had been at your house two weeks all the hair was cut off his head was it?

A. Yes.

Q. Just like you were shaved?

A. Shaved, yes, sir.

Q. Like it was done with the clippers when they cut it down close to the skull?

Mr. MARRON: Shaved, she says.

A. Shaved.

Q. Who did it?

A. Tom Milet.

Q. Do you know whether Dr. Carns knew anything about that?

A. I do not know.

Q. Was he still visiting him at your house at the time this was done?

A. Yes, sir.

Q. About what size were these spots where you say the hair was gone when you say he came back there?

A. About like a dollar.

532 Q. There were spots there as big as a dollar where the hair was all gone?

A. Yes, sir.

Q. How many of them were there?

A. I did not count them.

Q. You have some recollection?

A. I didn't have time to count the spots he had.

Q. You can remember about how many?

A. I could not say: I know I must have seen about half a dozen.

Q. How many?

A. I know I just seen 2, might be half a dozen.

Q. You say 2 of them?

A. Two I saw in front, I did not count them.

Q. Now, the first visit you made to him at the hospital was the second day after the accident?

A. Yes.

Q. You went up there with Mrs. Schmitt?

A. Yes, sir.

Q. That is the time you saw Mr. Marron and Mr. Loeb's?

A. Yes, sir.

Q. You never saw them there on any other day did you?

A. No, sir.

Q. Next time you went up there was the following Sunday?

A. Yes, sir.

Q. That is the time you went there with your husband and Mrs. Schmitt?

A. Yes, sir.

Q. What time of the day was that?

A. It was after 2; I cannot tell whether it was 3 o'clock; it was after

2. Q. Was that the time that he spoke about the slippers and being in the wrong bed?

A. No, sir.

Q. Did he mention the number of the room, or the red-headed man?

533 A. No, sir.

Q. When was it this took place?

A. It was through the week.

Q. The week following the first Sunday, 2nd week he was there?

A. They brought him there Tuesday and the first Sunday he was there he didn't act like that; it was the next week, the 2nd week—

Q. The first Sunday he acted all right?

A. He didn't know us at all.

Q. Did he recognize Mrs. Schmitt the first Sunday?

A. No, sir; I do not think he ever knew us.

Q. Is that a matter of opinion: did he speak to his wife?

A. No, sir; I asked him if he knows his wife: I asked him if he

know who that woman is, he said yes. I asked him who it is, he said Miss—I told his wife—I said it is his wife—Oh, go off, it is not, he said, it is Agnes, my sister.

Q. Who is Agnes?

A. It is my sister.

Q. When was it he said he was in the wrong bed?

A. It was in the 2nd week, in the evening.

Q. Who was with you when that took place?

A. Mrs. Schmitt and my husband.

Redirect examination by Mr. FIELD:

Mr. FIELD: One question I neglected to ask, I wish to ask: I want first to ask her on re-direct examination whether she has a sister named Agnes?

A. Yes, sir.

Q. I wish you would take off your glove and show the jury your left hand?

A. My right hand.

Mr. CHILDERS (examining hand of witness):

534 Q. That is the right hand?

A. It is not stiff.

(Witness showing hands to jury.)

Q. I will ask you whether or not your little finger on your right hand is hereditary in your family?

Mr. CHILDERS: I object to that question as calling for an opinion.

After argument:

Q. I will ask you whether your mother had a finger like that?

A. No, she didn't have a finger like that—just a little crooked here (showing). That finger here comes from a burn; I fell on the stove and burned that finger—they have fingers like that, that bend out, and a little on the sides.

Q. I will ask you whether your brother Joe Schmitt had such a finger as that before this accident?

A. No, sir; not like that.

Q. Well, describe—

Mr. CHILDERS: I object to the question.

The COURT: I think she can testify as to the condition of the fingers before he was hurt.

Mr. CHILDERS: It is not rebuttal; that is part of the case in chief.

Q. Tell the jury whether or not your brother, prior to this accident, had any deformed finger, or what was the condition of his hand?

A. It was in good condition, his hands and his finger was not in a bad condition.

535 The COURT: Describe how his fingers were; he asked you what condition they were in.

A. Well, his fingers was, on one side the bone was grown out here a little like mine here: this way.

Q. Show the finger to the jury?

A. (Showing to the jury.) Like here——

Q. Never mind talking to the jury?

Q. Now, what I want to know is whether or not your brother had any peculiarity about his hands whatever before this accident, except the shape of one little finger on the right hand?

A. Yes, sir.

Q. He had something else?

A. No, he didn't.

Q. And that little finger on his right hand was similar to your little finger on your right hand, as you have pointed out?

A. Yes, sir—just this on the side.

Cross-examined by Mr. CHILDERS:

Q. Let's see the other hand?

A. (Witness removes glove and exhibits hand).

Q. I will ask you to show that little finger to the jury, too?

A. (Witness exhibits finger referred to, to the jury).

Mr. CHILDERS: That is all.

Mr. FIELD: That is the case.

Mr. CHILDERS: We have several witnesses in sur-rebuttal. We did not expect to get into it quite so early.

536 Thereupon a recess was taken until 1:45 p. m.

Mr. FIELD: I will just have that testimony stri-ken out of the record; the testimony about her children, which was taken by the stenographer.

Mr. CHILDERS: I do not care about it.

Mr. FIELD: So the record will be straight about that, it is understood that that evidence is not offered?

The COURT: Yes.

*Sur-Rebuttal.*

D. H. CARNS, introduced in sur-rebuttal as a witness, on behalf of the defendant, testified further as follows:

Direct examination by Mr. CHILDERS:

Q. I understood you to say, Doctor, that you attended to the plaintiff after he was taken to his sister's house?

A. Yes, sir.

Q. Did you observe his hair after he was taken there?

A. Yes, sir.

Q. State whether or not there were any patches on the skull where the hair had come off in spots as big as a dollar, or any spots?

A. There were places on his head where we cut off the hair, probably in spots that might be that size, but not came out.

Q. State to the jury whether the hair would have regrown  
537 if it had been destroyed by scalding or burning?

Mr. FIELD: I object to that.

Q. Whether it would come out as a result of scalding or burning, whether if it would have come out, as the result of scalding or burning, if it would have regrown?

Mr. FIELD: I object to it, no proper foundation made.

The COURT: Overruled.

Mr. FIELD: Exception.

A. If it had been scalded sufficiently to make the hair drop off, in that case it would undoubtedly destroyed the hair follicles and the hair, of course, would not have come out, because after the hair follicles are destroyed you cannot make hair grow again.

Q. Now, do you know anything about his arms having been fastened down by straps at his sister's house?

A. Why, at one time when I put on stimulating lotions to stimulate the granulation of his hands, they were wrapped up and the nurse informed me that he had a habit of taking them off—as he could not get at them with his hands, by rubbing them against his teeth like that (indicating). I explained to him that it was absolutely necessary that he should not scratch it off—that he would tear down those granulations—

Mr. FIELD: I object to that as not responsive to the question.

538 Q. Well, what do you know about it?

The COURT: I think the explanation should come in response to another question.

A. Yes, I had him strap his hands; I had him tie his hands; I do not know whether he strapped them or tied them with a bandage—I told him to fix them—

Q. Well, why did you do that?

A. I did that to prevent him from scratching, in order that he would not tear up these granulations.

Q. I will ask you to state if, at that period of his recovery, there could have been any flow of blood from his hands by any result of that scratching?

A. Yes, sir; those granulations bleed very easily.

Q. What, if anything, did you ever hear about his catching cold in his hands when he visited you at your office?

A. I never knew of him taking any cold in them.

Q. State whether or not you told him not to bandage them up but to expose them to the atmosphere, when he was out of doors?

Mr. FIELD: I object; the witness has not said he ever did.

The COURT: I think you will have to be more specific if you are expecting to contradict the statement of the plaintiff.

After discussion:

Q. I will change the word bandages in that question to handkerchiefs?

A. Why, the probability is that I did tell him that; I do not remember telling him that; but that would be about like I would do if

he had those handkerchiefs on—I would tell him if he had it bandaged with handkerchiefs, that from that fact he might get some septic matter—something in there to poison it. I would naturally tell him not to put anything on except the medicated dressing.

Mr. FIELD: I move to strike out about what he would have done and his answer, because it is not sur-rebuttal.

The COURT: Overruled.

Mr. FIELD: Exception.

Q. Do you remember having any consultation with Mr. With, the brother-in-law of the plaintiff, in regard to his removal from the hospital, from the Sisters', to his house, to With's house?

A. I may have had; I do not know Mr. With. If I see him I could tell you; I had some conversation with somebody regarding it, but whether it was Mr. With, I do not now recall.

Q. I believe Mr. With is not here—that might enable you to know him, he works for Grunsfeld Brothers?

A. I would probably know him, if I saw him, but I do not know Mr. With by name; I know a Mr. With, but that was not the one I had any conversation with—I believe he is in the butcher business—I think I did have some conversation with some relative; I think some one came to the office or somewhere and asked me if he could move Mr. Schmitt to his house. I have a recollection of that. I do not remember the exact date or the exact circumstance, but I remember somebody did talk about it.

Q. State whether or not, in the way of fixing the time, that was about a week before he was removed?

A. I could not state the time at all; it was some time prior to his removal; I know that.

539 Q. State what, if anything, was said by this person in regard to his having acted queer?

Mr. FIELD: I object to this until they identify the person.

Q. Did anybody, representing themselves as a relative of the plaintiff—

Mr. FIELD: I object to what might have been said by anybody representing himself as a relative of the plaintiff.

Mr. CHILDERS: Then we will have to have Mr. With sent for; I did not wish to take up time to do it.

After argument:

Q. Was the man who talked to you the man of the house to which it was proposed to remove the plaintiff?

A. I presume it was; he said his house.

Q. And he was removed to his house, was he not?

A. He was removed; I told him he could be removed to his house, and when he was removed, I presume it was to his house, although I do not know positively.

Q. State whether or not you understood that it was to his sister's house, Schmitt's sister's house?



A. Yes, I know it was his sister's house, because I remember being introduced to her as his sister.

Q. Do you remember her name?

A. No, but I think her name was With. I could not swear to it positively.

Q. Well, now I renew my question; state whether the person who spoke to you about removing him to his house said anything to you about his, Schmitt's, having been acting queerly in the hospital or anything to that effect?

Mr. FIELD: I object to that, because the proper foundation has not been laid for contradiction.

Q. Whether he said it at any time?

The COURT: Objection overruled.

Mr. FIELD: Exception.

A. I do not remember of his asking me that question.

Q. State whether or not he reported to you at any time that Mr. Schmitt was delirious or out of his head—whether it was reported to you by anybody, and if so, when and at what stage of his infirmities?

A. Nobody ever reported him delirious to me.

Q. State whether or not you ever asked this person who spoke to you about removing him to his house or any other person as to whether there was anybody in Mr. Schmitt's family that had been crazy or anything to that effect?

A. No, sir; I never asked him a question of that kind.

Q. Did you, or not, tell this person at the time Mr. Schmitt was removed, that he could be removed?

A. Yes, sir; I told him he could be removed any time.

Q. Did you tell him that when he first applied to you or not?

A. He only applied once, this person, whoever he was.

Q. State whether or not he was removed at the time or on the same day that that application was made to you, that I have asked you about?

542 A. My recollection is that he was not; it seems to me it was several days after that, that he was removed.

Q. State whether or not you told him to leave him there until you would inform him that it was a proper time to remove him?

A. I do not have any recollection of telling him that.

Q. State whether or not he could have been removed at any time except that it was more advantageous to leave him at the hospital.

Mr. FIELD: I object to it as not sur-rebuttal.

The COURT: Overruled.

Mr. FIELD: Exception.

A. Well, it would not have interfered with him at all to have removed him at any time after the second week, although it would be more advantageous to keep him there, because he had a professional nurse, and so forth, and things would be more convenient; that would be the only objection to removing him.



Cross-examined by Mr. FIELD:

Q. When you were on the stand the other day and I was cross examining you, didn't I ask you whether or not Joe Schmitt had been tied in bed at any time while he was at his sister's house, and didn't you reply, if he was you didn't know anything about it?

A. Yes, sir; he never was; his hands were; but he was not.

Q. Oh, Joe Schmitt and his hands are two different people are they?

543 A. Well, in applying the expression to a man being tied, we generally mean putting a straight jacket on him—with reference to that: we might tie his fingers to keep him from biting it: it would not be tying him.

H. B. KAUFMAN, introduced as a witness in sur-rebuttal in behalf of the defendant being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name?

A. H. B. Kaufman.

Q. What is your profession?

A. Practice of medicine.

Q. How long have you been practicing medicine?

A. About 12 years.

Q. Are you a graduate of any institution?

A. Yes, sir.

Q. What institution?

A. Georgetown University.

Q. Where is that located?

A. Washington, D. C.

Q. I will ask you whether or not in your opinion if a man's scalp and hair are injured by scalding or burning, and the hair, in spots as large as a dollar, or anything like it, comes out on those spots—whether or not it would regrow there?

Mr. FIELD: I object to it: there is no proper foundation laid for it and it is not sur-rebuttal.

The COURT: Overruled.

Mr. FIELD: Exception.

544 A. It would depend on the degree of the burn or scalding.  
Q. Could you examine a man's head and determine whether the hair had been destroyed and had come out and had not regrown as a result of such an injury?

Mr. FIELD: I object to that question as not proper sur-rebuttal.

Q. In a burn of the first degree?

(After argument):

Q. I am assuming that the scalding or burning is what you surgeons classify as one of the first degree and of sufficient gravity to destroy the hair follicles?

Mr. FIELD: I object to that because it is a hypothetical question not based upon any evidence in the case: nobody claims that the hair follicles were destroyed.

Q. Well, of sufficient gravity to cause the hair to fall out: I will put it in that form?

Mr. CHILDERS: I will reframe the question by asking the doctor this:

Q. If a person had been accidentally scalded or burned on the scalp, causing the hair to fall out, could you tell whether the hair had fallen out by an examination of the head and scalp?

Mr. FIELD: I object to that.

The COURT: I do not think that is the same question: You asked him, as I understood you, and that is what I would allow in  
545 substance, if a man received a scald or a burn on the head sufficiently serious to cause the hair to fall, would the hair grow again?

Mr. CHILDERS: I will put the question in the form your honor suggests. I will accept it in that form.

Mr. FIELD: So will I.

A. Well, I should think that it would grow again if the hair follicles were not destroyed.

Q. What degree of scalding or burning is necessary to destroy the hair follicles?

A. That is hard to say: it would depend on the causing agent: for instance an acid that was not hot, just an ordinary acid, would burn into the hair follicles and destroy the scalp and hair follicles, whereas a hot fluid like water, might just simply cause a blister that would remove the scalp, cause the hair to loosen at the follicles and not destroy the roots itself in the follicles and might probably act as a stimulant and cause it to grow again.

Q. What would you say, if the destroying agent was water, steam or malt, or such a substance as is used in brewing beer: malt and grits?

A. Well, that would depend a good deal on the length of time that the heat was applied and also on the thickness of the hair. For instance, some heads are very thick and you might take a handful—

Q. Do you mean the head or—

A. The hair on the head might be like a great mat; you could take a hand full of flax-seed and clap it down on there and the heat would hardly get through: on the contrary where the head had rather a thin amount of hair, it would go through much quicker.

Q. I am assuming that the burning of the scalding, in the questions I put, was a burn of the first degree, as defined in the testimony in this case?

546 A. It would be pretty hard for the heat to kill the hair in that case.

Q. You heard the testimony of Dr. Carns describing the degree of this burn?

A. Yes, sir.

Q. And you have taken that degree for it?

A. I want to see if I understand correctly; I think he said it was Hyperaemia: is that the term he used?

Q. Yes.

A. That is nothing more or less than superficial inflammation—inflammation of the outerlayer; such as you would get from a sunburn: that is rather slight.

Cross-examined by Mr. FIELD:

Q. Well, boiling mash would not be calculated in your opinion to produce a Hyperaemia, would it?

A. On the skin or the hair?

Q. On the hair and the head?

A. That is hard to say, Mr. Field.

The COURT: I allowed some questions here, which it seems to me come to this: whether a man's head could be so heated by scalding that the hair would fall out and yet not be heated enough but that it would grow again?

A. Yes, sir.

Mr. FIELD: That is all.

Mr. CHILDERS: That is all. That is the case for the defendant.

The COURT: That is all the evidence is it?

A juror thereupon stated that he wished to ask a question  
547 Mr. FIELD: I want to suggest that the juror cannot propound questions to the court or counsel, but that he must propound them to the witness. The court can call the witness back if it occurs to me now. I suppose a juror might be allowed to propound a question to the court, in open court.

The COURT (to Juror): Well, Mr. Stortz, what is it you wish to know?

JUROR (Mr. Stortz): The circumstances under which the witness's names were signed to the release. Mr. Marron I think started to tell it, but was stopped for some reason or other: That is my recollection of it.

Mr. FIELD: My recollection of the state of the record on that is that Mr. Marron testified that at the time he wrote Joe Schmitt's name, and Mr. Marron will correct me if I am mistaken, and Joe Schmitt touched the pen, there was nobody present but myself, Mr. Jake Loeb and Joe Schmitt; that he never referred to the names or the attesting witnesses or to the fact that there were attesting witnesses, nor was he asked any question on the subject.

A JUROR: That is right, I think.

Mr. MARRON: I think I stated that after it was signed—

A JUROR: You started to state something.

548 Mr. CHILDERS: As far as Mr. Field goes, we agree, but we say that Mr. Marron stated that after the mark was affixed to the paper the witnesses were called in and signed it.

The COURT: I do not remember that he said anything about it.

Mr. FIELD: He didn't mention it, but I will not object to his going on the witness stand and making a statement about it.

Mr. CHILDERS: I have no objection to Mr. Marron taking the stand

and answering the question. I do not want to keep any competent evidence away from this jury.

The COURT: As it stands I would have to say to the juror that the counsel on each side have introduced such evidence as they thought fit, so far as it was allowed by the court, and it usually happens that there is comment by counsel, not only on the evidence that has been introduced, but on the failure to introduce other evidence, on one side or the other, and I suppose you will hear such comment in this case from both sides; but the record stands as it is made.

The JUROR (Mr. Gleason): I would like to ask, while we are in the jury room, in case there is some contention as to some matter in the evidence, whether we can send for information according to the record, as to our satisfaction: sometimes the jurors differ.

The COURT: You would have to refer such request to the court, and the court would hear counsel upon it and then act upon  
549 it. The general principle is that the Jurors have to rely upon their memories: of course, they compare memories, and in most cases they agree, I suppose about what they have heard, but not always.

Mr. CHILDERS: Do I understand that your honor has decided that Mr. Marron should not take the witness stand?

The COURT: You can do as you please.

Mr. MARRON: I am willing to testify about it.

Mr. CHILDERS: I ask Mr. Marron to take the stand and the juror can ask him any competent questions he may wish to ask about how it was signed.

O. N. MARRON, resumed the witness stand and testifies further as follows:

Mr. CHILDERS: He is at the service now of the juror.

The COURT: Mr. Marron is at your service, Mr. Stortz.

JUROR (Mr. Stortz): I cannot explain it any more plainly than I did: Just propound the question——

(By Mr. STORTZ, a JUROR:)

Q. If you are aware there are two witness's names to the release, I would like to know the circumstances under which those names were  
550 signed?

A. Well, that was an afterthought: it was, as we were leaving the room, after the release was signed. We met those two women at the door, they were standing in the hall conversing with one of the sisters and it just occurred to me that possibly it would be well to have the signature witnessed and I called those two women into the room and turning to Mr. Schmitt in the bed, I explained the situation to them and in their presence asked him if that was his signature, and he stated that it was, and then they signed their names: that is the way it happened.

Mr. FIELD: I desire to cross examine him on this point.

Cross-examination by Mr. FIELD:

Q. Where are those two women?

The COURT: We better see whether the juror wants to ask any more questions.

JUROR (Stortz): That is all I care for.

Q. Where are the two women.

A. I think that Mrs. Prestel lives in Albuquerque.

A JUROR (interrupting): Do you know those ladies that went there to sign that?

A. I know one of them.

JUROR: Are they here?

The COURT: Tell the juror that Mr. Field will cross examine.

551 A. I presume that Mrs. Prestel is here, but as far as the other one is concerned, I do not know where she is: at the time that those witnesses signed that, she was an employé at the hospital; as to whether she is there or not now, I do not know.

Mr. CHILDERS: Which is an employé?

A. The Garcia woman.

Mr. FIELD: You made no effort to get those two women here?

A. No.

Mr. FIELD: That is all.

Thereupon an intermission of an hour was taken for the purpose of obtaining the attendance of Mrs. J. W. Prestel.

Mrs. J. W. PRESTEL, introduced as a witness, being first duly sworn, testified as follows:

Examined by Mr. FIELD:

Q. What is your name?

A. Mrs. J. W. Prestel.

Q. Where do you live, Mrs. Prestel?

A. In Albuquerque, New Mexico.

Q. Were you summoned to be in attendance on this court on the 7th day of November by the sheriff?

A. I was summoned, but informed that I was not needed—I believe not wanted.

Q. Who informed you that you were not wanted?

A. I was informed by Mr. Marron and Mr. Childers.

Q. When?

552 A. I do not remember the exact date——

Mr. CHILDERS: I object to it as immaterial.

Mr. FIELD: I do not think it is immaterial.

Q. Do you know Joe Schmitt?

A. I do not know him.

Q. Will you look at that paper shown you and state whether or not your signature is appended to it?

A. (Witness examining paper, defendant's exhibit No. 4.) That is my signature there.

Q. Tell the jury when and where and under what circumstances you signed your name to that paper?

A. I signed it in the hospital at the request of Mr. Marron.

Q. Who was present?

A. I do not remember any one beside Mr. Marron.

Examined by Mr. CHILDERS:

Q. Was there anybody with Mr. Marron—Mr. Loeb's?

A. I think there was a gentleman in the room at the time.

Q. Was there any other gentleman in the room?

A. Yes, sir.

Q. Mr. Schmitt was there, was he not, the sick man?

A. The patient in the bed, yes sir.

Q. Were you introduced to him?

A. Yes, sir.

Q. By whom?

A. Mr. Marron.

Q. Did Mr. Schmitt say anything?

A. Not that I remember of.

Q. Was this mark (showing) on that paper when you signed it or not?

553 A. I do not remember.

Q. You do not remember whether that was already there or not?

A. No.

Q. Did Mr. Marron say anything to Mr. Schmitt at the time you were in the room besides—

Mr. FIELD: I do not think counsel should be allowed to lead this witness.

The COURT: I do not think it is harmful.

Q. Did Mr. Marron say anything to Mr. Schmitt besides introducing you to him?

A. I remember nothing only that he introduced me to him and said I would witness the signature.

Q. And said that you would witness the signature?

A. Yes, sir.

Q. Did you see there at that time a young Mexican lady named Alice Garcia?

A. As near as I can remember, I did see a girl, but I did not know her name.

Q. Did any other person sign this paper at the time you signed it as a witness?

A. No, sir; not in my presence.

Q. Was she in the room while you were there?

A. I do not remember exactly, but I think that she was there or near the door.

Q. Don't you remember that she was asked to witness it at the same time and that she came in and signed her name to it?

A. Not while I was in the room; I do not remember it.

Q. Do you remember that you and she were talking to one of the Sisters in the hall when Mr. Marron called you in: asked you to come in and witness the signature?

554 A. I was not talking to one of the Sisters that I remember of, and I was not talking to her.

Q. Were you talking to anybody?

A. Yes, sir.

Q. To whom?

A. A cousin of mine.

Q. What was your cousin's name?

A. My cousin's name was Tabor.

Q. Was the cousin a lady or a gentleman?

A. F. N. Tabor, my cousin.

Q. Where does he live?

A. I do not know where he is just now, he was living here at the time in the hospital.

Q. Do you know where Alice Garcia is?

A. I do not.

Q. When did you last see her?

A. I do not remember ever having seen her; I do not know her.

Q. Mr. Marron called you into the room for the purpose of witnessing this signature, didn't he?

A. He asked me if I would, yes, sir.

Q. And on his request you went in and witnessed it?

A. Yes, sir.

Q. Before you signed your name to it he introduced you to Mr. Schmitt, the sick man?

A. Yes, sir.

Q. The patient?

A. Yes, sir.

Q. And told him that he called you in to witness the signature?

A. That is what I remember.

Re-examined by Mr. FIELD:

Q. And you stated all that was said while you were in that room?

A. As well as I remember it.

Q. Describe the condition of this patient?

555 Mr. CHILDERS: I object to that as not part of the plaintiff's case; not sur-rebuttal.

The COURT: I think, under the circumstances, when the plaintiff calls a witness to the signature on the release, he ought to be permitted—

Q. Can you describe the condition of the patient?

A. I do not think I can; I did not know the condition of the patient.

Q. I speak of his appearance, Mrs. Prestel, was there anything peculiar about his appearance?

A. I remember of seeing that he was in bandages.

Q. Where were the bandages?

A. On his hands and face as well as I can remember.

Q. Was not his whole head bandaged up?

A. I do not remember.

Q. Well, perhaps I can refresh your recollection if I ask you if you cannot remember if his whole head and face were bandaged up and all you could see were his eyes and his mustache?

A. As I remember there were bandages around his face; how much they covered his head I do not know.

Q. You know he didn't speak while you were there?

A. Not that I remember of.

Q. And you have told all that was said that you remember while you were in the room?

A. Yes, sir.

Mr. FIELD: That is all.

Mr. CHILDERS: That is all.

556 Mr. CHILDERS: We will renew our motion for a peremptory instruction, that the court direct the jury to find the issues for the defendant, as we did at the close of the plaintiff's case.

Mr. FIELD: To which the plaintiff objects.

The COURT: The motion is denied.

Mr. FIELD: The case is closed as far as I am concerned.

Mr. CHILDERS: We have nothing more to offer.

The hour of five o'clock having arrived, the court adjourned until tomorrow morning at 9 a. m.

And now on this 15th day of November, at 9 a. m., the trial of this cause proceeded pursuant to adjournment.

Mr. CHILDERS: We make this offer to amend at this time, and wish to save the record.

"The defendant further alleges that the plaintiff had as full knowledge of the condition of the cooker, referred to in the complaint, as the defendant had. The defendant further alleges that, if the plaintiff, with such knowledge, used said cooker in the way he did use it, and with such knowledge, he used it under such conditions and circumstances as would have prevented any person of ordinary care and precaution from using the same."

557 Mr. CHILDERS: We offer that as an amendment to our answer.

Mr. FIELD: To which plaintiff objects.

After argument.

The COURT: Objection sustained.

Mr. CHILDERS: Defendant excepts.

Thereupon the instructions of the court, being in writing, are, by the court, submitted to the jury, together with special interrogatories presented by the defendant, which are also in writing.

The court thereupon charged the jury as follows: to-wit:

"GENTLEMEN OF THE JURY:

1.

"The plaintiff in this cause seeks to recover damages for injuries alleged to have been received by him January 2, 1906, while he was



in the employ of the defendant at its brewery in this city, through the defective condition of the apparatus with which he was set to work by the defendant."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 2.

"The defendant being a corporation necessarily acts through officers or agents, and it has not been questioned that the  
558 officers through whom it is claimed in behalf of the plaintiff it acted, in the matters testified of in this cause, had power to act in the premises, whether they did so act or not."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 3.

"It is a general rule of law that an employer is not the insurer of his employee against injury, but must use due care to provide safe machinery, appliances and tools for the use of his employees, and the employee must exercise due care in using them. Due care is such care as a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would presumably have exercised under the circumstances of the particular case. What would be due care in furnishing or using a hoe would not be due care in furnishing or using a steam engine. Negligence is the opposite of due care."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 4.

"It is also a rule of law that if an employee learns or knows that the place in which, or the appliance with which, he is working, are defective and dangerous, and continues to work without informing his employer of such condition, or if he does so inform him, fails to receive a promise to make the repairs or changes necessary to secure safety, he thereafter takes the risk of his employment under the existing dangerous condition."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

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## 5.

"But if he notifies his employer of such condition, receives his promise to amend the same and relying on such promise and by his employer's request, express or fairly to be inferred from the evidence, continues to work, although knowing of the defect and danger, and uses due care on his own part, having regard to the defective and dangerous conditions aforesaid, then, during the time reasonably necessary for making the repairs or changes necessary to secure safety, his employer will be liable to him in damages for any injuries he may receive while so employed, through such defective and dangerous conditions."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 6.

"You are instructed, therefore, that if you find from a preponderance of the evidence that the plaintiff while in the employ of the defendant learned that the kettle or cooker, which he was operating for the defendant in brewing beer, was in a defective and dangerous condition and made known the same to the defendant or its foreman under whom he was working, received the promise of the defendant that the cooker should be put in proper condition, continued to use the same, relying on such promises and within a time reasonably necessary for having it put in proper condition, he received injuries which were caused by its defective and dangerous condition, then you should find for the plaintiff, unless you also find from a preponderance of the evidence that he was guilty of contributory negligence by lack of due care in operating said cooker in view of its defective condition."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

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## 7.

"You are instructed that if the foreman of the defendant instructed the plaintiff how to use the cooker, the plaintiff had a right to assume, in the absence of knowledge to the contrary, that the cooker could be safely used in the way he was instructed to use it by the defendant, unless its condition, as it was known to him was so obviously dangerous that a man of ordinary prudence would not have continued to use it."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 8.

"The defendant alleges further that if the plaintiff did at any time have a lawful claim against it, as he alleges and which it denies, he gave a written release of said claim for a good consideration.

"To this the plaintiff replies that if the defendant obtained from him what purported to be a release, it was at a time when he was mentally incapable of executing a valid release."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 10.

"The paper which has been offered in evidence before you as a release purports to have been signed by the plaintiff's mark. A signature by mark is valid, if made by the direction of the signer, given with full knowledge of what he is doing and its effect, but not otherwise. If the signature of the plaintiff was put to the paper in question by mark in his presence but without his rational knowledge of the fact and effect of what he was doing, or if with rational knowl-

561 edge that he was directing his mark to be affixed to a written instrument, but he was mentally incapable of comprehending and did not comprehend the nature and effect of such instrument, then it was not a valid release."

To the giving of which paragraph of said charge, the defendant excepted and still excepts.

## 12.

"If, however, the alleged release was not valid at the outset, yet, if afterwards the plaintiff with full knowledge and understanding of its contents, accepted the consideration provided for by it, he is not entitled to recover damages in this action. But, if at the time of accepting such consideration or any part thereof, he did not know that the defendant was claiming to act in pursuance of the terms of the said release, was unaware of its terms until a copy of the same was filed with the answer of the defendant in this case, and within a reasonable time after he obtained knowledge of the terms of said release, he applied to the defendant in person or by his agent to be informed as to the amount of the alleged disbursements claimed by the defendant to have been made by it in pursuance of the terms of the said release with the view of tendering to the defendant repayment of the same, and the defendant refused to inform the plaintiff as to the amount of such disbursements and announced its determination to refuse to accept reimbursement at his hands, the plaintiff was under no obligation to pursue the matter further, and the fact that such disbursements were made by the defendant will not prevent the plaintiff from recovering in this action."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 13.

562 "You are instructed that if you find the issues for the plaintiff you should assess his damages at such sum, not exceeding Twenty-five Thousand Dollars, the amount claimed in the complaint, as you believe from the evidence will fully compensate him, so far as compensation in money may be made, for the injuries, if any, which he has received, and in assessing such damages you have a right to take into consideration plaintiff's loss of time, with reference to his condition and ability to earn money in his business or calling, his loss from the impairment, if any, of his capacity to earn money, whether such impairment, if any, be temporary or permanent, and also his physical pain, suffering and disfigurement, if any, resulting from such injuries. You may also consider whether or not the evidence satisfies you that the plaintiff is reasonably certain to suffer in the future as the result of his injuries, further physical pain and is reasonably certain to be physically unable to earn as much money as he was able to earn before the accident, and may allow compensation for such future physical pain and impairment of his ability to earn money if the evidence justifies you in believing that the plaintiff is reasonably certain, in the future, to suffer such physical pain and to have his ability

to earn money impaired as a direct result of such injuries. From the amount of damages, if any, to which upon the evidence and these instructions you may find the plaintiff is entitled, you should deduct the amount of disbursements by the defendant for the plaintiff, as detailed in the evidence, and which the plaintiff expresses his willingness to pay, namely, the sum of \$910.30."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 14.

In the course of the trial there have been various proffers of evidence made on one side and the other which the court held to be inadmissible. After so long a trial it may be difficult for you to distinguish, by memory, in every instance, between what was admitted as evidence and what was offered but not admitted.

563 You should, however, use your best effort to make that distinction, as mere offers of proof and proffers of evidence, including evidence which you have heard, but which was afterwards ordered to be struck out by the court, should be wholly disregarded by you."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 15.

"By a preponderance of evidence is not meant more witnesses, or a greater amount of testimony, but that in your belief the evidence on the affirmative of any particular question, much or little, and whether from one witness or more, must to some extent outweigh that on the negative of the same question."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 16.

"It is your duty to carefully scrutinize and to dispassionately weigh the testimony of all the witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive. You are not bound to accept as true any statement, simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witness as true, if for any good reason it appears unreliable or untrue. You have no right to reject the testimony of any of the witnesses without good reason, arising from the evidence in the case which includes the appearance and manner of witnesses in testifying, as well as what they said."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 17.

You are the sole judges of the weight of the evidence and of the credibility of the witnesses. To determine what weight should be

564 given to the testimony of any particular witness you should take into consideration his apparent capacity for observing, and remembering and describing what he has seen and heard, as people differ greatly in that respect. His opportunity of knowing that of which he testifies should be also taken into account, and you should especially consider whether he has any interest, bias or prejudice likely to affect his testimony. If you believe from the evidence in the case that any witness has such an interest, bias or prejudice you should allow it such weight as you think proper, to determine the value of his testimony.

If you believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material facts you may disregard the whole testimony of such witness, or you may give such weight to the evidence of such witness on other points as you may think it entitled to."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

## 20.

"You will have with you two forms of verdict, by one of which you can find for the plaintiff, and by the other for the defendant. In the former will be a space for the insertion of the amount of damages you may assess."

To the giving of which paragraph of the said charge, the defendant excepted and still excepts.

And thereupon the defendant asks the court to instruct the jury as follows, to-wit:

## 1.

"The court instructs the jury that if they believe from the preponderance of the evidence that the plaintiff in the discharge of his duty in connection with the management of the cooker and cooking of the malt and other substance placed therein, used more steam than was reasonably necessary to cook and prepare the malt or mash, with the preparation of which he was charged, or 565 did not properly manage or control the steam and the apparatus with which he was furnished, then he cannot recover in this action."

And the court refused to give the said instruction, to which action of the court, the defendant then and there excepted and still excepts.

## 2.

"The jury are further instructed that if the plaintiff knew that the cooker which he was called upon to use was not in a safe condition and the fact that it was not in such condition was obvious or well known to the plaintiff at the time that he undertook the doing of the brewing by the use of said cooker, then the plaintiff cannot recover in this action although he may have consented to undertake the said work reluctantly; that if the jury believe that such were the facts from the preponderance of the evidence, that the

danger was obvious or well known to the plaintiff, then the plaintiff assumed the risk in so doing, and the defendant is not liable and they should find a verdict in favor of the defendant."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 3.

"The jury are further instructed that if the plaintiff, knowing the dangerous condition of the cooker, with the management of which he was charged, still continued and consented to use the same, and that the risk, -f any, was obvious to him and that the danger was one not ordinarily incident to the business, that he might as a rule decline to accept the employment and discharge of the said duty, and if he chose to encounter the danger and take his chances, he assumes the risk, and that this is so, although the risk may have arisen from the negligent performance of the master's duty and its failure to have previously caused the cooker to be repaired and put in proper condition."

566 And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 4.

"The court instructs the jury that an employé who knowing and appreciating the risk incident to his employment, voluntarily places himself in a position of danger with respect to the building in which he is to work or the machinery or appliances which he is called upon to use, and subjects himself to obvious danger, even though he should not appreciate the full extent of the danger, assumes the risk of the injury that may result to him therefrom; and if they believe from the preponderance of the evidence that the plaintiff, well knowing the dangerous condition of the cooker mentioned in the pleadings and referred to in the evidence in this cause, continued to act as brewer on the morning of the second day of January, 1906, the day on which the said accident is alleged to have occurred, then they should find a verdict in favor of the defendant."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 5.

"The jury are further instructed that the fact that the cooker mentioned in the pleadings and which the plaintiff was called upon to use, had been repaired upon former occasions and that repairs had been necessary, is not of itself sufficient to show conclusively that it was not reasonably adapted to and safe for the purpose for which it was used, if it could have been so used by the plaintiff with ordinary care and precaution. And they are further instructed that the duty upon the employer to see that the appliances

567 which he furnishes to his employes are reasonably fit and safe for the use for which they are furnished does not relieve the employee from the exercise of his own judgment in the use thereof, and if he uses them in a manner for which they are not designed to be used, or subjects them to a strain beyond their capacity to bear, and is injured in consequence, the employer is not liable."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 6.

"The court further instructs the jury that needless exposure to a known danger by an employee is negligence; that a voluntary choice of an obviously dangerous way of doing work, when a reasonably safe way is available, is negligence, notwithstanding the customary use of such method; and that whether a choice of a particular method constitutes negligence depends upon the knowledge of the employee, actual or implied, of the danger and the conditions attending the doing of the work at the time of the injury."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 7.

"The jury are instructed that although a servant may engage in employment and in the use of a defective place or defective machinery or appliances, known to him to be dangerous, and may have complained to his employer of such defects or danger, and although the employer may have promised to remedy such defects and may have failed to do so within a reasonable time, yet, if the jury believe from the preponderance of the evidence, that the defects or danger was so imminent that a person of ordinary prudence would not have continued in the employment after the discovery of the defect, then the employee is not entitled to recover; and if they

568 believe from the preponderance of the evidence in this case that the plaintiff continued in the employment of the defendant, knowing that the condition of the cooker was such that no person of ordinary prudence would have continued in the employment, knowing such dangerous condition, then they should find a verdict in favor of the defendant.

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted, and still excepts.

## 8.

"The jury are further instructed that if they believe from the preponderance of the evidence that the dangerous condition of the cooker was known to the plaintiff for months, or for any great length of time, or was generally known and was a matter of frequent discussion of months between the plaintiff and the defendant or its officers and agents, and that such dangerous condition when so known was such that no person of ordinary prudence would have subjected himself to the risk of using the said cooker, then, although



they believe from the evidence that the defendant promised to remedy the defendants, as testified to by plaintiff, on the day before the said accident happened, the plaintiff is not entitled to recover and they should find a verdict in favor of the defendant."

And the court refused to give the said instruction, to which action of the court, the defendant then and there excepted and still excepts.

## 9.

"The jury are further instructed that if they believe from the preponderance of the evidence that the defendant did not promise to repair said cooker on the second day of January, 1906, as alleged in the complaint, or on the first day of January, as testified to by the plaintiff, and that the plaintiff well knew the dangerous condition

of the said cooker, when he entered upon the discharge of his  
569 duties on the morning of the second day of January, when it is alleged said accident occurred, then the plaintiff assumed the risk and hazard of the employment in which he was engaged and is not entitled to recover in this case and the jury should find a verdict in favor of the defendant."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 10.

"The jury further instructed that the master's duty to his servant with respect to machinery or appliances, is sufficiently discharged by providing those that are reasonably safe and fit; and an appliance is reasonably safe and fit when it can be used by the servant in the course of his employment, without danger to himself, by the exercise of ordinary care; and that if the jury believe from the preponderance of the evidence that the plaintiff did not exercise ordinary care in the use of the cooker mentioned in the complaint, then they should find a verdict in favor of the defendant. (140 Fed. Rep. 568.)"

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 11

"The court instructs the jury that although they may believe from the evidence that the plaintiff had complained of the defective condition of the cooker mentioned in the complaint, and that the defendant had promised to make it safe by proper repairs, yet if the plaintiff fully appreciated the danger, and it was so imminent that a man of ordinary prudence would refuse to encounter it, then such promise does not render the defendant liable in this case and the jury should find a verdict in favor of the defendant.

And the court refused to give the said instruction, to which  
570 action of the court the defendant then and there excepted and still excepts.

## 12.

"The jury are further instructed that an employee who unnecessarily adopts a dangerous method of doing work when another



method less dangerous is open to him, assumes the risk of so doing."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 13.

"The court instructs the jury that if they find a verdict in favor of the plaintiff after considering all the evidence and the instructions of the court, in estimating the damages which plaintiff is entitled to recover they should confine themselves to such sum as will fairly compensate the plaintiff for physical and mental suffering, if any, caused by the injury, and for any permanent impairment of his capacity to earn money, if any, that may have been caused by and directly resulted from the injury complained of; and their finding should be based upon the evidence in the cause as to each of the elements which the court has instructed you should be considered in arriving at the amount of your verdict.

In estimating these damages the jury are not at liberty to compensate him for loss of time or expenses incurred on account of his injury, it appearing from the evidence that he was paid his wages during the time he wasn't working on account of the injury and did not lose any money, and that all his expenses incident to the injury were also paid by the defendant."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 14.

571 "The jury are further instructed that in cases of this kind the defendant is not liable for vindictive damages, but only for such damages as are compensatory and fairly compensate the injured party for such injuries as he may have actually sustained, if any, and for his physical and mental suffering, if any or either, as the result of the injury, and for the permanent impairment, if any, of his capability to earn money, that may have been caused by and directly resulted from the injury complained of; but the court further instructs the jury that if the evidence does not show that the plaintiff's earning capacity has been diminished, then they should not take this into consideration in arriving at the amount of their verdict."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 15.

"The jury are further instructed that to entitle the plaintiff to recover in this case, he must satisfy you that the injuries complained of resulted from the negligence of the defendant and that at the time of the accident plaintiff was without any fault or negligence which proximately entered into and contributed to his injuries, for if at that time his negligence proximately contributed to his injuries it would defeat his right to recover.

"Negligence, in a legal sense, has been defined to be the failure to observe, for the protection of the interests of another person, that

degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 16.

572 "The court instructs the jury that it is the duty of the defendant to use ordinary care in furnishing a proper cooker and appliances which were reasonably safe and suitable for the purpose for which they were intended to be used; but the jury are further instructed that if they believe from a preponderance of the evidence that the accident was occasioned by any defect in the cooker furnished which was not known to the defendant, or any of its officers or agents, and that the plaintiff, as well as the officers and superintendent or manager of the defendant, had equal opportunity to know the dangerous condition of the cooker used, then the plaintiff assumed the risk of the employment in which he was engaged and the defendant is not liable."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 17.

"The jury are further instructed that it was the duty of the defendant to use ordinary care to see that the cooker used by the plaintiff was reasonably safe and suitable for the purpose for which it was intended to be used; nevertheless, if the jury believe from a preponderance of the evidence, that the injury was caused not by any defect to which the attention of the defendant had been called and the repair of which had been attempted, as shown by the evidence, by patches, but some other defect which caused the accident, before the accident actually happened, it would not render the defendant liable, if the jury further believe from a preponderance of the evidence that within a reasonable time after its attention had been called to the general defective condition, if any, of the cooker, defendant had taken steps to remedy the same with as reasonable promptness and as soon as the same could have been reasonably remedied; and if the plaintiff continued in the employment of the defendant, with full knowledge of the facts and circumstances, and without any specific promise on the part of the defendant to  
573 remedy such general defect, then the defendant is not liable and they should find a verdict for the defendant."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 18.

"The court instructs the jury that the defendant was required to use only ordinary care in furnishing a reasonably safe and suitable cooker for the purpose for which it was intended to be used. What is ordinary care cannot be determined abstractly. It is necessarily a relative term. It must be measured by the nature of the work to be done, the instruments to be used, the hazard and peril of the situ-

ation. The law by "ordinary care" means simply the caution and vigilance which reasonable and prudent men exercise under like circumstances. The jury are further instructed that in the exercise of ordinary care, the employer does not become an absolute insurer of the safety of the employee, nor is he bound under all circumstances to provide for him the most approved or best improved machinery and equipments, or such as are absolutely safe. His care in this respect is ordinary precaution."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 19.

"The court instructs the jury that if in the present case you should find from the evidence that the plaintiff on the day that he is alleged to have signed the release offered in evidence was delirious or his mental faculties were otherwise obscured by the injuries from which he was suffering,—still this would not necessarily prevent him having sufficient capacity to execute such release. Delirium or obscuration of the mental faculties by disease or injury must be so complete and so becloud the mind that the person entering into a  
574 contract sought to be impeached for want of capacity to make the same does not understand the nature of the business in which he is engaged and does not understand at the time of executing the instrument, substantially the act, and the extent of his rights and the effect of the instrument upon his rights.

"The jury are further instructed that the burden of showing that the plaintiff's mental faculties were so effected by delirium, or were so obscured by the effect of the injury which he has received, as to so completely becloud the plaintiff's mind that he did not understand the nature of the business in which he was engaged and the effect of the release which he alleged to have signed, upon his rights, is upon the plaintiff, and unless they believe from the preponderance of the evidence that such a state of facts is established, then they should find a verdict in favor of the defendant."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 20.

"The court instructs the jury, that in all cases involving questions of sanity and insanity, *prima facie*, the person is sane, and when there is only evidence sufficient to raise a doubt of a person's insanity, the presumption in favor of sanity must prevail. When an instrument is made by a person of competent age, and under no legal disability, it will be taken and held to be valid and binding until incompetency is established, by a preponderance of the evidence."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 21.

"The jury are further instructed that if they believe from a preponderance of the evidence that the plaintiff had his mental  
575 faculties about him and understood the nature of the act which he is alleged to have done, in signing the release offered

in evidence, and so understanding the same, gave his assent to the execution of the said release by touching the pen, knowing that his name was signed to the same, — thereby adopted the signature of his name signed thereto; and they should find a verdict in favor of the defendant."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 22.

"The jury are further instructed that it is not necessary that the plaintiff should have actually signed his own name to the instrument offered in evidence as a release. If the plaintiff, knowing the nature of his act, with mental capacity sufficient to understand what he was doing, at the time that the same was presented to him, touched the pen and thereby assented to the execution of the said instrument, such touching of the pen and assent has the same effect in law as if he had signed his own name thereto."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

## 23.

"The defendant asks the court to instruct the jury:—that if the plaintiff knew the terms of the release substantially, although he may not have had a copy of it, and had reason to believe or knew that the weekly wages paid him were being paid in consequence of the release that he had signed, then the acceptance of such weekly wages was a ratification of his act, although he may not have been conscious and rational at the time that he signed the release."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

576 And thereupon counsel addressed the jury, and at the conclusion of the argument, at the request of the defendant, the court submitted to the jury questions to be answered specifically in connection with their general verdict, and the jury having returned a general verdict in favor of the plaintiff, also returned answers to the special questions and said special questions and answers by the jury are as follows, to-wit:

"1. Was the plaintiff conscious and rational at the time his mark was affixed to the release offered in evidence by the defendant?

No.

2. Was the plaintiff delirious, unconscious or irrational after the accident, and if so, for what period of time?

Yes; about 10 days.

3. Was the plaintiff unconscious, delirious or irrational continuously from the time of the accident until after his mark was affixed to the release offered in evidence by the defendant?

Yes.

4. Was the cooker which the plaintiff was using at the time that

the accident occurred in such a bad condition and state of repair that any man of ordinary care, prudence and precaution would not have used the same?

No.

5. Was the plaintiff sufficiently advised that the cooker was in such condition that it could not be used with safety pending the time after the order was given for the procurement of the material and repair of the cooker and the happening of the accident?

No.

6. Did the defendant through Henry Loeb, its manager, at any time promise the plaintiff that the cooker would be repaired, as an inducement for him to continue using the same? If so, when?

Yes. At the time it was examined by Mr. Ridley.

577 7. Could the cooker have been used by the plaintiff for the purpose for which he was using it, without turning on a degree of pressure of steam which would have caused the accident?

No.

8. Could the plaintiff have used the cooker for the purpose for which he was using it without turning on sufficient steam to create any pressure on the cooker?

No.

9. Would the accident have happened if the plaintiff had done the brewing, if it could have been so done, without using pressure?

No.

10. Was the cooker in such condition to the knowledge of the plaintiff at the time that he did the brewing that the use of steam in the doing of the brewing was so hazardous as to prevent an ordinary cautious and careful man from using the same?

No.

11. Did the defendant use ordinary care and precaution in furnishing the cooker which was used by the plaintiff, and in having it repaired when repairs were needed?

No.

12. Did the plaintiff, with knowledge of the conditions of the release claimed to have been executed by him, accept and receive his weekly wages from the defendant company before he returned to his work and began active service as an employé of the defendant company?

No.

13. Did the plaintiff on the second day of January, the day the accident happened, have as much knowledge of the condition of the cooker as did the defendant and its agents and officers?

Yes.

14. Did the plaintiff have as much knowledge of the condition of the cooker at and before the time of the accident as did the defendant?

578 Yes."

And upon the return of the said verdict and answers the following occurred:

And now, on this 16th day of November, 1907, the following proceedings were had in said cause, to-wit:

Present, as before:

Comes now the jury and return their verdict into court:

The COURT: Gentlemen, who is your foreman?

A JUROR (Mr. Kemmerer): I am the foreman.

Thereupon the foreman hands verdict to the court:

The COURT: Gentlemen: I suppose counsel wish the court to open this sealed verdict and see what it contains?

Mr. CHILDERS: I wish it noted on the record that this verdict—I will not interrupt now. I think it is not necessary to do it until after the court reads the verdict.

The COURT: I believe when there are questions and answers it is customary to read the verdict first and then the questions and answers. Is that as you understand it?

Mr. FIELD: Yes, sir; I think so.

The COURT: The Clerk will read the verdict and the questions and answers (the Court handing papers to the Clerk).

579 The Clerk thereupon read the general verdict returned by the jury.

The COURT: Is that your verdict, Mr. Foreman?

The FOREMAN: Yes, sir.

Mr. CHILDERS: I want to note on the record our exception to the verdict on the ground that the jury separated without the direction of the Court.

The COURT: That is not the fact.

Mr. CHILDERS: And further because the attention of counsel for the defendant was not called thereto.

The COURT: The fact is that the court left a direction to the sheriff before adjournment yesterday, that if the jury agreed upon a verdict that they should seal it up.

Mr. CHILDERS: Was I present?

The COURT: I do not know but that you were gone. The Court remained in session quite a little while, although I think both you and Mr. Field said you did not care to stay any longer. You may have gone, but the Court remained in session for an hour or more. I finally sent word to the jury and asked if they wanted to have supper, and they said they did——

580 Mr. CHILDERS: I wish to act in perfectly good faith with the Court. I do not want any question of fact between you and me as to whether I was here.

The COURT: I would not say so. I think you and Mr. Field had both gone—afterwards I instructed them to return a sealed verdict if they agreed, and if they disagreed to send for me.

Mr. CHILDERS: If Your Honor had said it in my presence I would not make the objection now.

The COURT: You can take your exception. I said to the Sheriff last night that if they agreed they could seal up their verdict——

Mr. FIELD: Before I left the court-room I asked Your Honor if they should agree if they could return a sealed verdict——

Mr. CHILDERS: You never said anything of that kind to me.

The COURT: I think Mr. Childers had gone——

Mr. CHILDERS: I had.

The COURT: I had to do something with it.

Mr. CHILDERS: Mr. Field fights with the saber out of the scabbard.

He asks no quarter—we give no quarter——

581 The COURT: I think it has been declared often enough on both sides to make that plain. I am perfectly willing that you should have every advantage of everything that actually occurred—that is what actually occurred, that I directed Mr. Heyn to get into communication with me if there was no agreement, and I would come over. Of course, I would have sent for you and Mr. Field to come over.

Mr. CHILDERS: I do not want to claim any mis-statement of fact on the record. I leave my own recollection to Your Honor's.

Mr. FIELD: I submit Your Honor should receive the verdict.

The COURT: The verdict is received.

Mr. FIELD: The answers have not been received.

The COURT: The Clerk will read the questions and answers.

Thereupon the Clerk read the questions and answers of the jury thereto, which are in writing.

The COURT (Upon conclusion of the reading). Are these your answers to the several questions propounded, Mr. Foreman?

The FOREMAN: Yes, sir.

582 The COURT: Do all the jurors answer?

Thereupon the jurors answer in the affirmative.

The COURT: Is there anything further that either of you want to say at this time?

Mr. CHILDERS: The jury may be excused as far as I am concerned. I want to give notice of motion for judgment on the answers made by the jury to the interrogatories submitted by the defendant, and if that is overruled I wish to move for a new trial. I simply want to give notice.

The COURT: Yes. That is all either of you have to say at this time?

Mr. CHILDERS: That is all I have to say.

The COURT: The jury can then be discharged, and take their places in the court-room.

Thereafter the following statement was taken down by the stenographer by the direction of the Court:

Mr. CHILDERS: I wish it to appear in the record that I never did consent and my consent was not asked and I had no knowledge that the Court ever directed the jury that they could bring in a sealed verdict and separate after the cause was submitted to them.

The COURT: I should wish it to appear that immediately after the jury went out to consider the case Mr. Childers went away and was not represented here at the usual time of adjournment.

583 (Conclusion of Case.)

And thereafter and on the 20th day of November, 1907, the defendant filed a motion for judgment upon the special findings of the jury, which said motion is as follows, to-wit:



"Now comes the defendant in the above entitled cause and moves the Court to enter judgment in said cause in its favor:

1. Because the questions answered as special findings No. 13 and No. 14 are inconsistent with the general verdict.

2. Because said special findings No. 13 and No. 14, especially taken in connection with special findings Nos. 4 and 5 are inconsistent with the general verdict.

3. Because special findings Nos. 13 and 14 taken in connection with special finding No. 9 are inconsistent with the general verdict.

4. Because the special findings construed together as a whole are inconsistent with the general verdict."

Which said motion for judgment was overruled by the Court, to the overruling of which said motion, and to the refusal of the Court to enter judgment upon the special findings of the jury, the defendant then and there excepted and still excepts.

And within the time allowed by law, the defendant moved the Court to set aside the verdict and grant it a new trial. The motion for a new trial being in words and figures following, to-wit:

"Comes now the defendant in the above entitled cause and moves the Court to set aside the verdict rendered in the said cause, and grant it a new trial, the grounds of the said motion are as follows:

1st. Because the plaintiff admitted over the objection of the defendant irrelevant, immaterial and incompetent testimony on the trial, in that the plaintiff's counsel was permitted to ask leading questions continuously and persistently on some of the most

584 important matters in the cause, as in the case of the Witness Schmitt, the Court permitting him to be thus plied with questions, and eliciting the answer to the effect that the plaintiff was requested by the defendant to use the cooker on the first day of January, under promise by the defendant to repair which questions were grossly leading, suggestive and abusive of discretion.

2nd. Because the Court permitted the plaintiff to prove by witnesses who had not qualified themselves as experts, and who had not shown sufficient knowledge so to testify to the mental condition of the plaintiff continuously after the injury, these witnesses being the plaintiff's wife and sister, Mrs. Schmitt and Mrs. With, and Mr. With, and the Witness Bossert.

3rd. Because the Court permitted the Witness Ridley to express his opinion while on the witness stand without qualifying himself to do so, and testified to immaterial, irrelevant and incompetent matters.

4th. Because the Court refused to admit relevant, material and competent testimony offered by the defendant upon the trial of the said cause, which plainly appears upon the face of the records.

5th. Because the Court erroneously instructed the jury as to the law on said cause, and the defendant particularly specifies the following instructions:

(a) Instruction No. 3. In that it uses the words "due care" and not "ordinary care," and does not state the law as favorably to the defendant as it should have stated it, and as asked for by the defendant.



(b) Instruction No. 5. Because said instruction submits to the jury the proposition that the defendant could have been bound by the implied promise to repair, when such is not the law, and because there is no testimony in the case upon which said instruction could be based.

(c) Instruction No. 6. Because the said instruction does not correctly charge the jury as to the law of "ordinary care" used, 585 the Court using the expression "due care," and fails to define what would be a reasonable time for the plaintiff to rely upon the defendant's promise to repair the cooker, and is otherwise inaccurate and misleading.

(d) Instruction No. 7. Because it was not based upon any evidence in the cause, and plaintiff had not received the instructions relative to the use of the cooker since he first commenced using it in April, 1905, and because the jury have found by their special findings that the plaintiff has as much knowledge of the condition of the cooker when he was using it as the defendant, and because said instruction is misleading, and does not correctly state the law.

(e) Instruction No. 10. Because the said instruction is conflicting and misleading in that if the plaintiff with rational knowledge directed his mark to be affixed thereto, he must have been necessarily mentally capable of comprehending the nature and effect of such instrument, and because the testimony of the plaintiff is that he was absolutely irrational all the time.

(f) Instruction No. 12. Because the said instruction in effect, tells the jury that if the plaintiff was unaware of the exact terms of the release until a copy of it was filed with the pleadings, then he could accept his pay under the release and that said pay would not be a ratification, and because said instruction is not based upon the evidence, the uncontradicted testimony being that plaintiff did know that such a paper had been executed by him, and did know that he was receiving pay under the agreement mentioned in the paper.

(g) Instruction No. 13. Because the instructions submits to the jury elements of damage which are not based upon evidence in the cause, especially future incapacity to earn money, and future disfigurement and physical pain, and because the instruction submits to them the right of the plaintiff to recover Twenty-five Thousand

(586 (\$25,000.00) Dollars, when it clearly appears from the evidence that the said sum is grossly excessive, and because the said instruction does not state the law relative to damages in this case, and because the said instruction does not state the law as to the preponderance of evidence as against the defendant.

(h) Instruction No. 16. Because said instruction fails to point out to the jury that they may consider and should consider any interest that witnesses may have had in the cause and his relation thereto, or the parties connected therewith.

6th. Because nowhere in the instruction is the rule of preponderance of evidence in favor of the defendant stated to the jury, although such instructions were requested by the defendant.

7th. Because the Court refused defendant's requested instructions

numbered from one to twenty-three, inclusive, and defendant points out the following grounds of exception:

(a) Because requested instruction No. 1 correctly defines the rule of preponderance of evidence applicable to the cause, and an insufficient instruction was given by the Court on this subject; and also submits other matters which the defendant was entitled to have submitted to the jury, not covered by the Court's instructions.

(b) Because the Court refused to give requested instruction No. 2 which said instruction correctly submits the law as to the effect that the obvious condition of the cooker or its known condition to the plaintiff at the time he undertook to use the same when the accident happened would have upon plaintiff's rights.

(c) Because the Court refused to give requested instruction No. 3, which said instruction correctly defines the assumption of the risk on the part of the employé, and it is not properly defined in any other instruction in the cause.

(d) Because the Court refused to give requested instruction No. 4, which said instruction correctly defines the assumption of the  
587 risk on the part of the employé, and it is not properly defined in any other instruction in the cause.

(e) Because the Court refused to give requested instruction No. 5, which correctly defines the risk assumed by plaintiff, and no instruction is given covering the proposition contained in requested instruction.

(f) Because the Court refused to give requested instruction No. 6, which instruction correctly states the law, and it is called for by the evidence, and is not submitted to the jury by any other instruction given.

(g) Because the Court refused to give requested instruction No. 7, which instruction correctly states the law with reference to any alleged promise that may have been made by the defendant to remedy defects, provided such defects were obvious to the party using same, and that the defendant had failed to remedy same after a reasonable time from the making of such promise, and such proposition is not covered by any other instruction in the cause.

(h) Because the Court refused to give requested instructions Nos. 8 and 9, which instructions correctly state the law on the same proposition as given in the preceding instruction and as applicable to the evidence, and is not covered by any other instruction.

(i) Because the court refused to give the requested instructions Nos. 10, 11 and 12, which instructions correctly state the rule of law as to ordinary care on the part of the plaintiff, under the evidence in this cause; and because the court did not give any instruction on the rule of law as to ordinary care applicable to the evidence in this cause.

(j) Because the court refused to give the requested instructions Nos. 13 and 14, which instructions correctly state every element of damage which the jury were entitled to consider in arriving at their verdict in this cause, and because it correctly states the rule of com-

588      pensation, and the instructions given by the court includes elements not properly to be considered by the jury, and does not state the rule of compensation correctly.

(*k*) Because the court refused to give the requested instruction No. 15, which instruction correctly states the rules of proximate cause and correctly defines negligence, and these propositions are not covered by any instructions given by the court.

(*l*) Because the court refused to give requested instructions Nos. 16, 17, and 18, said instructions stating the rule of law correctly as to the degree of care incumbent upon the defendant and the effect of the knowledge and want of knowledge of the defect of the cooker, or as to whether or not the injury was occasioned by defects to which the attention of the defendant had been called, which is not covered by any other instructions.

(*m*) Because the court refused to give requested instruction No. 19, which said instruction asked the court to define the effect of delirium or obscuration of the mental faculties in such a case as this, and the rule of the preponderance of evidence or burden of proof applicable thereto, which is not covered by any other instruction in the cause.

(*n*) Because the court refused to grant instructions Nos. 20, 21 and 22, as to presumption and burden of proof in such cases, for the same reason as to the foregoing instructions.

(*o*) Because the court refused to grant requested instruction No. 23, for the reason that it was contended and the court instructed the jury in effect that unless the plaintiff had a copy of the release, any other knowledge would not have bound him, although with such knowledge he may have received his weekly wages thereunder, before resuming his employment with the company.

8th. Because the verdict in this case is contrary to and not supported by the evidence; because an inspection of the special findings in this cause made by the jury show that the jury has made  
589      findings not based upon the evidence, and not sustained by any evidence in the case, which said findings are numbered as follows:

No. 2, No. 5. The jury have found by No. 13 that the plaintiff had as much knowledge of the condition of the cooker as the defendant.

No. 6. The plaintiff not having testified to anything that was said at that time, and the defendant simply having testified what he repeated to the plaintiff what Ridley had told him.

No. 7 and No. 8. Also because the finding No. 9 is in conflict with findings Nos. 7 and 8.

No. 10 and 11. Because they are not sustained by evidence, and in conflict with other findings pointed out.

No. 13 and 14. Because finding No. 13 precludes any recovery in this cause, and is in conflict with other findings, and shows that there was no negligence on the part of the defendant.

9th. Because the verdict is excessive and must have included punitive damages under the instructions of the court, and the re-

fusal of the court to instruct upon that subject, as requested by the defendant.

10th. And for many other good and sufficient reasons *and* apparent on the face of the record.

11th. Because the court erred in overruling the motion of the defendant to direct the jury to return a verdict in favor of the defendant at the close of the testimony for the plaintiff.

12th. Because the court erred in overruling the motion of the defendant to direct the jury to return a verdict in favor of the defendant at the close of all of the testimony in the cause.

Wherefore defendant prays that the verdict of the jury herein be set aside, and *set* for naught, and that it be granted a new trial."

590 But the court denied the said motion for a new trial and entered judgment on the verdict of the jury in favor of the plaintiff, to which action of the court, the defendant then and there excepted and still excepts.

#### PLAINTIFF'S EXHIBIT D.

(Copy.)

"ALBUQUERQUE, N. M., November 20, 1906.

Southwestern Brewery & Ice Company, City.

GENTLEMEN: If you will render a statement showing the amount paid out by you to Mr. Schmitt, and for other purposes, in connection with the release which you set up in your answer to the case of Joseph Schmitt vs. The Southwestern Brewery & Ice Company, pending in the District Court of Bernalillo County, Mr. Schmitt will refund to you the amount so paid at once.

Very truly, etc.,

(Signed)

NEILL B. FIELD."

#### PLAINTIFF'S EXHIBIT E.

Jacob Loeb, President.

Henry Loeb, Sec. and Treas.

Southwestern Brewery & Ice Co.

ALBUQUERQUE, N. M., 11-22-'06.

Neil B. Field, Esq., Albuquerque, N. Mex.

DEAR SIR: We are in receipt of your favor of the 20th inst. We are advised by our counsel that the consideration which we paid to Mr. Joseph Schmitt for a release of his cause of action against the Southwestern Brewery & Ice Company was perfectly valid and legal, and that the release executed by him is binding. He having received the consideration for the same and executed the release, we have no claim for a return of the consideration and decline to receive it. Any other expenses that the Company

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may have paid on account of the accident to Mr. Schmitt, the Company cheerfully paid as it would do for any of its employees.

Very respectfully,

SOUTHWESTERN BREWERY & ICE CO.,  
Per JACOB LOEBS, *President*.

### DEFENDANT'S EXHIBIT 3.

Know all men by these presents; That I, Joseph Schmitt, of the City of Albuquerque, in the County of Bernalillo and Territory of New Mexico, for and in consideration of the Southwestern Brewery & Ice Company paying for all medical attention, hospital fees and medicines and further that the Southwestern Brewery & Ice Company during the time of my sickness continues to carry me on the pay roll of the Company and pays and is to pay me during my said sickness the same wages as heretofore paid me by said Company, and until the attending physician declares that I am able to resume my position and perform the duties thereof with said Company, do hereby release and forever discharge the said Southwestern Brewery & Ice Company, its successors and assigns of and from all actions, causes of action, suits, controversies, claims and demands whatsoever for or by reason of the accident which happened and occurred at the plant of the said Southwestern Brewery & Ice Company, on Tuesday, the second day of January, 1906, which said accident happened by reason of the tank known as the Rice Cooker having exploded.

In witness whereof, I have hereunto set my hand and seal this 6th day of January, A. D. 1906.

(Signed)

his  
JOSEPH x SCHMITT.  
mark.

Witness:-

ALICE GARCIA.  
Mrs. J. W. PRESTEL.

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### DEFENDANT'S EXHIBIT 4.

Southwestern Brewery and Ice Company. No. 6782.

ALBUQUERQUE, N. M., *Mch* 12, 1906.

Pay to the order of Jos. Schmitt \$20.00 Twenty and no-100 Dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY & ICE CO.,  
By HENRY LOEBS, *Treas.*

Endorsed: Jos. Schmitt. Swartzman & With. Paid stamp, State National Bank, Albuquerque, N. M. Paid. Mar. 16, 1906.

## DEFENDANT'S EXHIBIT 5.

Southwestern Brewery and Ice Company. No. 6808.

ALBUQUERQUE, N. M., *M'ch* 19, 1906.

Pay to the order of Jos. Schmitt \$20.00 Twenty and no-100 Dollars.

To First National Bank, Albuquerque, N. M.,

SOUTHWESTERN BREWERY & ICE CO.,  
By HENRY LOEBS, *Treas.*

Endorsed: Joe Schmitt. Schwartzmann & With. Paid stamp,  
State National Bank, Albuquerque, N. M. Paid. Mar. 30, 1906.

## DEFENDANT'S EXHIBIT 6.

Southwestern Brewery and Ice Company. No. 6830.

ALBUQUERQUE, N. M., *M'ch* 26, 1906.

Pay to the order of Joseph Schmitt \$20.00 Twenty and no-100 Dollars.

To First National Bank, Albuquerque, N. M.,

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

593 First National Bank, Albuquerque, N. M., Mar. 28, 1908.  
Stamp Paid, First National Bank.

Endorsed: Joe Schmitt. Geo. Schneider.

## DEFENDANT'S EXHIBIT 7.

Southwestern Brewery and Ice Company. No. 6856.

ALBUQUERQUE, N. M., *April* 2, 1906.

Pay to the order of Joseph Schmitt \$20.00 Twenty and no-100 Dollars.

To First National Bank, Albuquerque, N. M.,

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

Stamped Paid, First National Bank, Albuquerque, N. M., Apr. 6, 1906.

Endorsed: Joe Schmitt. Albuquerque Cash Groc. Co. For Deposit Only.

## DEFENDANT'S EXHIBIT 8.

Southwestern Brewery and Ice Company. No. 6882.

ALBUQUERQUE, N. M., *Apr. 9, 1906.*

Pay to the order of Joseph Schmitt \$20.00 Twenty and no-100 Dollars.

To First National Bank, Albuquerque, N. M.,

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

Stamped Paid First National Bank, Albuquerque, N. M., Apr. 12, 1906.

Endorsed: Joe Schmitt.

## DEFENDANT'S EXHIBIT 9.

Southwestern Brewery and Ice Company. No. 6928.

ALBUQUERQUE, N. M., *Apr. 16, 1906.*

Pay to the order of Joseph Schmitt \$20.00 Twenty and no-100 Dollars.

594 To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

Stamped Paid, First National Bank, Albuquerque, N. M., Apr. 19, 1906.

Endorsed: Joe Schmitt. A. Fleischer.

## DEFENDANT'S EXHIBIT 10.

Southwestern Brewery and Ice Company. No. 6953.

ALBUQUERQUE, N. M., *Apr. 23, 1906.*

Pay to the order of Joseph Schmitt \$20.00 Twenty and no-100 Dollars.

To First National Bank, Albuquerque, N. M.,

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

Paid First National Bank, Albuquerque, N. M., Apr. 26, 1906.

Endorsed: Joe Schmitt. Albuquerque Cash Gro. Co., For Deposit Only.

## DEFENDANT'S EXHIBIT 11.

Southwestern Brewery and Ice Company. No. 6975.

ALBUQUERQUE, N. M., *Apr. 30, 1906.*

Pay to the order of Joseph Schmitt \$20.00 Twenty and no-100 Dollars.

To First National Bank, Albuquerque, N. M.,

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

Stamped Paid. First National Bank, Albuquerque, N. M., May 3, 1906.

Endorsed: Joe Schmitt. Albuquerque Cash Gro. Co. For Deposit Only.

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## DEFENDANT'S EXHIBIT 12.

Southwestern Brewery and Ice Company. No. 7003.

ALBUQUERQUE, N. M., *May 7, 1907.*

Pay to the order of Jos. Schmitt \$20.00 twenty and no-100 dollars.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

To First National Bank, Albuquerque, N. M.

Stamped Paid, First National Bank, Albuquerque, N. M., May 10, 1906.

Endorsed: Joe Schmitt. Albuquerque Cash Gro. Co. For deposit only.

## DEFENDANT'S EXHIBIT 13.

Southwestern Brewery and Ice Company. No. 6510.

ALBUQUERQUE, N. M., *Jan. 2, 1905.*

Pay to the order of Joseph Schmitt \$16.70 sixteen and 70-100 dollars.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

To First National Bank, Albuquerque, N. M.

Stamped Paid, First National Bank, Albuquerque, N. M., Jan. 3, 1906.

Endorsed: Joe Schmitt. Albuquerque Cash Gro. Co. For deposit only.



## DEFENDANT'S EXHIBIT 14.

Southwestern Brewery and Ice Company. No. 6547.

ALBUQUERQUE, N. M., *Jany.* 8, 1906.Pay to the order of Joseph Schmitt \$20.00 twenty and no-100  
dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY & ICE CO.,  
By HENRY LOEBS, *Treas.*596 Stamped Paid, First National Bank, Albuquerque, N. M.,  
Feb. 12, 1906.

Endorsed: Joseph Schmitt, Eugene With.

## DEFENDANT'S EXHIBIT 15.

Southwestern Brewery and Ice Company. No. 6573.

ALBUQUERQUE, N. M., *Jany.* 15, 1906.Pay to the order of Joseph Schmitt \$20.00 twenty and no-100  
dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

12, 1906. Stamped paid, First National Bank, Albuquerque, N. M., Feb.

Endorsed: Joe Schmitt, Eugene With.

## DEFENDANT'S EXHIBIT 16.

Southwestern Brewery and Ice Company. No. 6591.

ALBUQUERQUE, N. M., *Jan.* 22, 1906.Pay to the order of Joseph Schmitt \$20.00 twenty and no-100  
dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

12, 1906. Stamped Paid, First National Bank, Albuquerque, N. M., Feb.

Endorsed: Joe Schmitt, Eugene With.

## DEFENDANT'S EXHIBIT 17.

Southwestern Brewery and Ice Company. No. 6614.

ALBUQUERQUE, N. M., Jan. 29, 1906.

Pay to the order of Joseph Schmitt \$20.00 twenty and no-100 dollars.

597 To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

Stamped Paid, First National Bank, Albuquerque, N. M., Feb. 15, 1906.

Endorsed: Joe Schmitt, Eugene With.

## DEFENDANT'S EXHIBIT 18.

Southwestern Brewery and Ice Company. No. 6639.

ALBUQUERQUE, N. M., Feb. 5, 1906.

Pay to the order of Joseph Schmitt \$20.00 twenty and no-100 dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

Stamped Paid, First National Bank, Albuquerque, N. M., Feb. 15, 1906.

Endorsed: Joe Schmitt, Eugene With.

## DEFENDANT'S EXHIBIT 19.

Southwestern Brewery and Ice Company. No. 6670.

ALBUQUERQUE, N. M., Feb. 12, 1906.

Pay to the order of Joseph Schmitt \$20.00 twenty and no-100 dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*

Stamped Paid, First National Bank, Albuquerque, N. M., Feb. 15, 1906.

Endorsed: Joe Schmitt, Eugene With.

## DEFENDANT'S EXHIBIT 20.

Southwestern Brewery and Ice Company. No. 6741.

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ALBUQUERQUE, N. M., *Mar.* 5, 1906.

Pay to the order of Joseph Schmitt \$20.00 twenty and no-100 dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY & ICE CO.,  
By HENRY LOEBS, *Treas.*Stamped Paid, First National Bank, Albuquerque, N. M., *Mar.* 9, 1906.

Endorsed: Joe Schmitt.

## DEFENDANT'S EXHIBIT 21.

Southwestern Brewery and Ice Company. No. 6717.

ALBUQUERQUE, N. M., *Feb.* 26, 1906.

Pay to the order of Joseph Schmitt \$20.00 twenty and no-100 dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*Stamped Paid, First National Bank, Albuquerque, N. M., *Mar.* 3, 1906.

Endorsed: Joe Schmitt, Chas. May.

## DEFENDANT'S EXHIBIT 22.

Southwestern Brewery and Ice Company. No. 6695.

ALBUQUERQUE, N. M., *Feb.* 19, 1906.

Pay to the order of Joe Schmitt \$20.00 twenty and no-100 dollars.

To First National Bank, Albuquerque, N. M.

SOUTHWESTERN BREWERY AND ICE CO.,  
By HENRY LOEBS, *Treas.*Stamped Paid, First National Bank, Albuquerque, N. M., *Feb.* 23, 1906.

Endorsed: Joe Schmitt, Eugene With.

599 TERRITORY OF NEW MEXICO,  
County of Bernalillo, ss:

I hereby certify the above and foregoing 452 pages of type-written matter to be and contain a full, true and complete transcript of my stenographic notes of all the testimony, rulings of the court, exceptions and proceedings had at the trial of the foregoing entitled cause, and all exhibits introduced thereat except plaintiff's exhibits 1, 2 and 3, which exhibits are two iron balls and an iron wheel, and defendant's exhibits 1 and 2, defendant's exhibit 1 being a drawing made by one La Driere, and defendant's exhibit No. 2 being a drawing made by the witness-plaintiff.

Witness my hand this April 6, 1908.

HARRY P. OWEN,  
*Official Stenographer.*

And for as much as the matters and things herein set out are not of record in the said cause, the said defendant prays that this, its Bill of Exceptions, containing all of the evidence offered, admitted and rejected, with the rulings of the court thereon, and the exceptions of the defendant thereto, taken at the time, together with all of the instructions asked by the defendant, given and refused, and the charge of the court to the jury, and the exceptions of the defendant thereto, and all of the proceedings of the said trial, with the rulings of the court thereon, may be signed, sealed and enrolled by the Judge of this court, and made a part of the record and proceedings therein; which is done this 24th day of April, 1908.

IRA A. ABBOTT, *Judge.*

Endorsed: "Filed in my office this 24th day of April, 1908.  
John Venable, Clerk."

TERRITORY OF NEW MEXICO,  
County of Bernalillo, ss:

600 I, John Venable, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, in obedience to an order granting an appeal hereinbefore set forth, do hereby certify unto the Supreme Court of the Territory of New Mexico, the above and foregoing as a true, correct and complete transcript and copy of so much of the record and proceedings had in the cause lately pending in said County of Bernalillo wherein Joseph Schmitt was plaintiff and The Southwestern Brewery & Ice Company was defendant as same appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 24th day April, A. D., 1908.

[SEAL.]

JOHN VENABLE,  
*Clerk of the District Court.*

601 & 602 And Afterwards, on to wit, *on* the 3rd day of April, A. D., 1908, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico an order of extension, which said order of extension was and is in the following words and figures following to wit:—

In the District Court of the Second Judicial District of the Territory of New Mexico within and for the County of Bernalillo.

7176.

JOSEPH SCHMIDT, Plaintiff,

vs.

SOUTHWESTERN BREWERY AND ICE CO., Defendant.

*Order.*

It appearing to the court that the attorney for the plaintiff and the defendant respectively, have stipulated that the time for the preparing of the transcript of the record for filing in the Supreme Court be extended thirty (30) days.

It is hereby ordered by the court that the time for such filing be and it is hereby extended thirty days.

IRA A. ABBOTT, *Judge.*

TERRITORY OF NEW MEXICO,

*County of Bernalillo, ss:*

I, John Venable, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico within and for the county of Bernalillo, do hereby certify that the above and foregoing is a true, correct and complete copy of an order extending the time now of record in my said office in the above styled cause.

Witness my hand and the seal of the said Court this 2nd day of April, A. D., 1908.

(Signed)

[SEAL.]

JOHN VENABLE,

*Clerks of the District Court.*

603 which said order of extension was and is endorsed on the back thereof in the following words and figures towit:—  
“No. 1230, Schmidt vs. Southwestern Brewery and Ice Co. Extension order. Filed in my office this April 3, 1908, Jose D. Sena, Clerk.

And Afterwards, on towit:—*on* the fourteenth day of April, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an order of extension of time which said order of extension was and is in the following words and figures towit:—

In the District Court, Territory of New Mexico, County of Bernalillo.

7176.

JOSEPH SCHMIDT, Plaintiff,

vs.

THE SOUTHWESTERN BREWERY & ICE Co., Defendant.

For good cause shown, the attorneys for the plaintiff and the defendant, consenting. It is hereby ordered by the court that the time for filing of the record in this cause in the Supreme Court and the settling of the Bill of Exceptions is further extended ten days.

IRA A. ABBOTT, *Judge.*

TERRITORY OF NEW MEXICO,  
*County of Bernalillo, ss:*

I, John Venable, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, do hereby certify that the above and foregoing is a true, correct and complete copy of an Order of Extension of Time in the above styled cause now of record in my said office.

Witness my hand and the seal of the said court this 14th day of April, A. D., 1908.

(Signed)  
[SEAL.]

JOHN VENABLE,  
*Clerk District Court.*

604 which order of extension was and is endorsed on the back thereof as follows to-wit:—No. 1230. Joseph Schmidt, vs. Southwestern Brewery and Ice Co. "Order of extension of time." Filed in my office this April 14th, 1908, Jose D. Sena, Clerk.

And Afterwards, on to-wit, *on* the twenty-third day of April, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an order of extension of time in the above entitled cause, which said order of extension of time was and is in the following words and figures to-wit:

In the District Court of the Second Judicial District of the Territory of New Mexico within and for the County of Bernalillo.

No. 7176.

JOSEPH SCHMIDT, Plaintiff,

vs.

SOUTHWESTERN BREWERY & ICE Co., Defendant.

For good cause shown, it is hereby ordered that an additional ten days be and it hereby is granted for the settling of the Bill of

Exceptions, and the filing of the transcript in the above entitled cause in the Supreme Court; this in addition to any time heretofore granted in said cause for said purposes.

IRA A. ABBOTT, *Judge.*

TERRITORY OF NEW MEXICO,  
*County of Bernalillo, ss:*

I, John Venable, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico within and for the County of Bernalillo, do hereby certify that the above and foregoing is a true correct and complete copy of an order of extension in the above entitled cause now of record in my said office.

Witness my hand and the seal of said court this 22nd day of April, A. D., 1908.

(Signed)

[SEAL.]

JOHN VENABLE,

*Clerk of the Said District Court.*

605 which said order of extension was and is endorsed on the back thereof as follows to wit:—No. 1230. Joseph Schmidt, vs. Southwestern Brewery & Ice Co., Order of extension—Filed in my office this 23rd day of April, A. D., 1908, Jose D. Sena, Clerk.

And Afterwards, on to wit: *on* the thirtieth day of April A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors for appellants in the above entitled cause, which said assignment of errors was and is in the following words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908.

No. 1230.

JOSEPH SCHMIDT, Appellee.

vs.

SOUTHWESTERN BREWERY & ICE CO., Appellant.

Appeal from District Court, Bernalillo County.

*Assignment of Errors.*

Comes now the appellant, The Southwestern Brewery & Ice Company by its attorney, and shows to the court here, that in the record, proceedings and judgment in the District Court of Bernalillo County, in the above entitled cause, there is manifest error in this, to wit:—

1. The court erred in overruling the objection of the defendant to the following question propounded to the witness Schmidt:—

“Q. State whether or not on the first day of January, Henry

Loebs said to you that he wanted you to use that boiler for one or two more brewings?" (found on page — of the printed transcript.)

2. The court erred in over-*ru*ling the objection of the defendant to the following question put to witness Schmidt:—

"Q. What, if anything, Mr. Schmidt, induced you to continue the use of the boiler and attempt to brew with it on the 2nd day of January 1906?" (found on page — of the printed transcript.)

3. The court erred in not permitting the defendant to cross-examine the witness Ridley relative to what he told the defendant company, and the officers of the defendant company as to how long a time the cooker would last without repairing. (which cross-examination is on page — of the printed record.)

4. Because the court erred in overruling the motion of the defendant, company to instruct the jury to find a verdict in its favor at the close of the testimony for the plaintiff.

5. Because the court erred in excluding the testimony of the witness Marron, relative to the conversation had between the witness and the plaintiff in the case. (Found on page — of the printed transcript.)

6. The court erred in permitting counsel for the plaintiff to ask leading and suggestive questions to the plaintiff while he was on the stand relative to the alleged request of the defendant that the plaintiff use the cooker a certain time, while said cooker was in the alleged defective condition.

7. The court erred in overruling the motion of the defendant for a peremptory instruction that the court direct the jury to find the issue for the defendant at the close of all the testimony in the case.

8. The court erred in admitting improper evidence on the part of the plaintiff.

9. The court erred in excluding proper evidence offered on the part of the defendant.

10. The court erred in overruling the motion of the defendant to amend its answer to the effect, "defendant further alleges that the plaintiff has had as full knowledge of the condition of the cooker referred to in the complaint as the defendant had. Defendant further alleges that if the plaintiff with such knowledge, used said cooker in the way he did use it, and with such knowledge, he used it under such conditions and circumstances as would have prevented any person of ordinary care and precaution from using the same."

11. The court erred in instructing the jury as follows:

"The plaintiff in this cause seeks to recover damages for injuries alleged to have been received by him January 2, 1906, while he was in the employ of the defendant at its brewery in this city, through the defective condition of the apparatus with which he was set to work by the defendant."

12. The court erred in instructing the jury as follows:

"The defendant being a corporation necessarily acts through officers or agents, and it has not been questioned that the officers



through whom it is claimed in behalf of the plaintiff it acted, in the matters testified of in this cause, had power to act in the premises, whether they did so act or not."

13. The court erred in instructing the jury as follows:

"It is a general rule of law that an employ<sup>ed</sup> is not the insurer of his employ<sup>é</sup> against injury, but must use due care to provide safe machinery, appliances and tools for the use of his employ<sup>és</sup>, and the employ<sup>é</sup> must exercise due care in using them. Due care is such cases as a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would presumably have exercised under the circumstances of the particular case. What would be due care in *in* furnishing or using a hoe would not be due care in furnishing or using a steam engine. Negligence is the opposite of due care."

14. The court erred in instructing the jury as follows:

"It is also a rule of law that if an employ<sup>é</sup> learns or knows that the place in which, or the appliances with which, he is working, are defective and dangerous, and continues to work without informing his employer of such condition, or if he does so inform him, fails to receive a promise to make the repairs or changes necessary to secure safety, he thereafter takes the risk of his employment under the existing dangerous condition."

15. The court erred in instructing the jury as follows:—

"But if he notifies his employer of such condition, receives his promise to amend the same and relying on such promise and by his employer's request, express or fairly to be inferred from the evidence, continues to work, although knowing of the defect  
608 and danger, and uses due care on his own part, having regard to the defective and dangerous conditions aforesaid, then, during the time reasonable necessary for making the repairs or changes necessary to secure safety, his employer will be liable to him in damages for any injuries he may receive while so employed, through such defective and dangerous conditions."

16. The Court erred in instructing the jury as follows:

"You are instructed, therefore, that if you find from a preponderance of the evidence that the plaintiff while in the employ of the defendant learned that the kettle or cooker, which he was operating for the defendant in brewing beer, was in a defective and dangerous condition, and made known the same to the defendant or its foreman, under whom he was working, received the promise of the defendant that the cooker should be put in proper condition, continued to use the same, relying on such promises and within a time reasonably necessary for having it put in proper condition, he received injuries which were caused by its defective and dangerous condition, then you should find for the plaintiff, unless you also find from a preponderance of the evidence that he was guilty of contributory negligence by lack of due care in operating said cooker in view of its defective condition."

17. The Court erred in instructing the jury as follows:—

"You are instructed that if the foreman of the defendant instructed the plaintiff how to use the cooker, the plaintiff had a right

to assume, in the absence of knowledge to the contrary, that the cooker could be safely used in the way he was instructed to use it by the defendant, unless its condition, as it was known to him was so obviously dangerous that a man of ordinary prudence would not have continued to use it."

18. The court erred in instructing the jury as follows:—

"The defendant alleges further that if the plaintiff did at any time have a lawful claim against it, as he alleged and which it denies, he gave a written release of said claim for a good consideration.

To this plaintiff replies that if the defendant obtained from him what purported to be a release, it was at a time when he was mentally incapable of executing a valid release."

609 19. The court erred in instructing the jury as follows:—

"The paper which has been offered in evidence before you as a release purports to have been signed by the plaintiff's mark. A signature by mark is valid, if made by the direction of the signer, given with full knowledge of what he is doing and its effect, but not otherwise. If the signature of the plaintiff was put to the paper in question by mark, in his presence but without his rational knowledge of the fact and effect of what he was doing, or if with rational knowledge that he was directing his mark to be affixed to a written instrument, but he was mentally incapable of comprehending and did not comprehend the nature and effect of such instrument, then it was not a valid release."

20. The court erred in instructing the jury as follows:—

"If, however, the alleged release was not valid at the outset, yet, if afterwards the plaintiff with full knowledge and understanding of its contents, accepted the consideration provided for by it, he is not entitled to recover damages in this action. But if at the time of accepting such consideration or any part thereof, he did not know that the defendant was claiming to act in pursuance of the terms of the said release, was unaware of its terms until a copy of the same was filed, with the answer of the defendant in this case, and within a reasonable time after, he obtained knowledge of the terms of said release, he applied to the defendant in person or by his agent to be informed as to amount of the alleged disbursements claimed by the defendant to have been made by it in pursuance of the terms of the said release with the view of tendering to the defendant repayment of the same, and the defendant refused to inform the plaintiff as to the amount of such disbursement, and announced its determination to refuse to accept reimbursement at his hands, the plaintiff was under no obligation to pursue the matter further, and the fact that such disbursements were made by the defendant will not prevent the plaintiff from recovering in this action."

21. The court erred in instructing the jury as follows:—

"You are instructed that if you find the issues for the plaintiff you should assess his damages at such sum, not exceeding  
610 twenty-five thousand dollars, the amount claimed in the complaint, as you believe from the evidence will fully compensate him, so far as compensation in money may be made, for the injuries, if any, which he has received, and in assessing such damages

you have a right to take into consideration plaintiff's loss of time, with reference to his condition and ability to earn money in his business or calling, his loss from the impairment, if any, of his capacity to earn money, whether such impairment, if any, be temporary or permanent, and also his physical pain, suffering and disfigurement, if any, resulting from such injuries. You may also consider whether or not the evidence satisfies you that the plaintiff is reasonably certain to suffer in the future as the result of his injuries, further physical pain and is reasonably certain to be physically unable to earn as much money as he was able to earn before the accident, and may allow compensation for such future physical pain and impairment of his ability to earn money if the evidence justifies you in believing that the plaintiff is reasonably certain in the future to suffer such physical pain and to have his ability to earn money impaired as a direct result of such injuries. From the amount of damages, if any, to which upon the evidence and these instructions you may find the plaintiff is entitled, you should deduct the amount of disbursements by the defendant for the plaintiff, as detailed in the evidence, and which the plaintiff expresses his willingness to pay, namely, the sum of \$910.30"

22. The court erred in instructing the jury as follows:—

"In the course of the trial there have been various proffers of evidence made on one side and the other which the court held to be inadmissible. After so long a trial it may be difficult for you to distinguish by memory, in every instance, between what was admitted as evidence and what was offered but not admitted. You should, however, use your best effort to make that distinction, as mere offers of proof and proffers of evidence, including evidence which you have heard but which was afterwards ordered to be struck out by the court, should be wholly disregarded by you."

611 23. The court erred in instructing the jury as follows:—

"By a preponderance of evidence is not meant more witnesses, or a greater amount of testimony, but that in your belief the evidence on the affirmative of any particular question, is much or little, and whether from one witness or more, must to some extent outweigh that on the negative of the same question."

24. The court erred in instructing the jury as follows:—

"It is your duty to carefully scrutinize and to dispassionately weigh the testimony of all the witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive. You are not bound to accept as true any statement, simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witness as true, if for any good reason it appears unreliable or untrue. You have no right to reject the testimony of any of the witnesses without good reason, arising from the evidence in the case which includes the appearance and manner of witnesses in testifying, as well as what they said."

25. The court erred in instructing the jury as follows:—

"You are the sole judges of the weight of the evidence and of the credibility of the witnesses. To determine what weight should be given to the testimony of any particular witness you should take

into consideration his apparent capacity for observing, and remembering and describing what he has seen and heard, as people differ greatly in that respect. His opportunity of knowing that of which he testifies should also be taken into account, and you should especially consider whether he has any interest, bias or prejudice likely to affect his testimony. If you believe from the evidence in the case that any witness has such an interest, bias or prejudice you should allow it such weight as you think proper, to determine the value of his testimony.

If you believe from the evidence that any witness who has testified in this case has knowingly and wilfully testified falsely to any material facts you may disregard the whole testimony of such witness, or you may give such weight to the evidence of such witness on other points as you may think it entitled to."

612 26. The court erred in instructing the jury as follows:—

"You will have with you two forms of verdict, by one of which you can find for the plaintiff, and by the other for the defendant. In the former will be a space for the insertion of the amount of damages you may assess."

27. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:—

"The court instructs the jury that if they believe from the preponderance of the evidence that the plaintiff in the discharge of his duty in connection with the management of the cooker and cooking of the malt and other substances, placed therein, used more steam than was reasonably necessary to cook and prepare the malt or mash, with the preparation of which he was charged, or did not properly manage or control the steam and the apparatus with which he was furnished, then he cannot recover in this action."

28. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:—

"The jury are further instructed that if the plaintiff knew that the cooker which he was called upon to use was not in a safe condition and the fact that it was not in such condition was obvious or well known to the plaintiff at the time that he undertook the doing of the brewing by the use of said cooker, then the plaintiff cannot recover in this action although he may have consented to undertake the said work reluctantly; that if the jury believe that such were the facts from the preponderance of the evidence, that the danger was obvious or well known to the plaintiff, then the plaintiff assumed the risk in so doing, and the defendant is not liable and they should find a verdict in favor of the defendant."

29. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:—

"The jury are further instructed that if the plaintiff, knowing the dangerous condition of the cooker, with the management of which he was charged, still, continued and consented to use the same, and that the risk, if any, was obvious to him and that the danger

613 was one not ordinarily incident to the business, that he might as a rule decline to accept the employment and discharge the said duty, and if he chose to encounter the danger and take his

chances, he assumes the risk and that this is so, although the risk may have arisen from the negligent performance of the master's duty, and its failure to have previously caused the cooker to be repaired and put in proper condition."

30. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The court instructs the jury that an employé who knowingly and appreciating the risk incident to his employment, voluntarily places himself in a position of danger with respect to the building in which he is to work, or the machinery or appliances which he is called upon to use, and subjects himself to obvious danger, even though he should not appreciate the full extent of the danger, assumes the risk of the injury that may result to him therefrom; and if they believe from the preponderance of the evidence that the plaintiff, well knowing the dangerous condition of the cooker mentioned in the pleadings and referred to in the evidence in this cause, continued to act as brewer on the morning of the second day of January, 1906, the day on which the said accident is alleged to have occurred, then they should find a verdict in favor of the defendant."

31. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:—

"The jury are further instructed that the fact that the cooker mentioned in the pleadings and which the plaintiff was called upon to use, had been repaired upon former occasions, and that repairs had been necessary, is not of itself sufficient to show conclusively that it was not reasonably adapted to and safe for the purpose for which it was used, if it would have been so used by the plaintiff with ordinary care and precaution. And they are further instructed that the duty upon the employer to see that the appliances which he furnishes his employes are reasonably fit and safe for the use for which they are furnished, does not relieve the employé from the exercise

614 of his own judgment in the use thereof, and if he uses them in a manner for which they are not designed to be used, or subjects them to a strain beyond their capacity to bear, and is injured in consequence, the employer is not liable."

32. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The court further instructs the jury that needless exposure to a known danger by an employé is negligence; that a voluntary choice of an obviously dangerous way of doing work, when a reasonably safe way is available, is negligence, notwithstanding the customary use of such method; and that whether a choice of a particular method constitutes negligence depends upon the knowledge of the employé, actual or implied, of the danger and the conditions attending the doing of the work at the time of the injury."

33. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The jury are instructed that although a servant may engage in employment and in the use of a defective place or defective machinery or appliances, known to him to be dangerous, and may have complained to his employer of such defects and danger, and although the em-

ployer may have promised to remedy such defects and may have failed to so do within a reasonable time, yet, if the jury believe from the preponderance of the evidence, that the defects or danger was so imminent that a person of ordinary prudence would not have continued in the employment after the discovery of the defect, then the employé is not entitled to recover; and if they believe from the preponderance of the evidence in this case that the plaintiff continued in the employment of the defendant, knowing that the condition of the cooker was such that no person of ordinary prudence would have continued in the employment, knowing such dangerous condition, then they should find a verdict in favor of the defendant."

34. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

615 "The jury are further instructed that if they believe from the preponderance of the evidence that the dangerous condition of the cooker was known to the plaintiff for months, or for any great length of time or was generally known and was a matter of frequent discussion of months between the plaintiff and the defendant or its officers and agents, and that such dangerous condition when so known was such that no person of ordinary prudence would have subjected himself to the risk of using the said cooker, then, although they believe from the evidence that the defendant promised to remedy the defects, as testified to by plaintiff, on the day before the said accident happened, the plaintiff is not entitled to recover and they should find a verdict in favor of the defendant."

35. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The jury are further instructed that if they believe from a preponderance of the evidence that the defendant did not promise to repair said cooker on the second day of January, 1906, as alleged in the complaint, or on the first day of January, as testified to by the plaintiff, and that the plaintiff well knew the dangerous condition of the said cooker when he entered upon the discharge of his duties on the morning of the second day of January, when it is alleged said accident occurred, then the plaintiff assumed the risk and hazard of the employment in which he was engaged and is not entitled to recover in this case and the jury should find a verdict in favor of the defendant."

36. The court erred in refusing to instruct the jury, at the request of the defendant as follows:

"The jury are further instructed that the master's duty to his servant with respect to machinery or appliances, is sufficiently discharged by providing those that are reasonably safe and fit; and an appliance is reasonably safe and fit when it can be used by the servant in the course of his employment, without danger to himself, by the exercise of ordinary care; and that if the jury believe from the preponderance of the evidence that the plaintiff did not exercise  
616 ordinary care in the use of the cooker mentioned in the complaint then they should find a verdict in favor of the defendant."

37. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The court instructs the jury that although they may believe from the evidence that the plaintiff had complained of the defective condition of the cooker mentioned in the complaint, and that the defendant had promised to make it safe by proper repairs, yet if the plaintiff fully appreciated the danger, and it was so imminent that a man of ordinary prudence would refuse to encounter it, then such promise does not render the defendant liable in this case, and the jury should find a verdict in favor of the defendant."

38. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The jury are further instructed that an employé who unnecessarily adopts a dangerous method of doing work when another method less dangerous is open to him, assumes the risk of so doing."

39. The court erred in refusing to instruct the jury at the request of the defendant, as follows:

"The court instructs the jury that if they find a verdict in favor of the plaintiff after considering all the evidence and the instructions of the court, in estimating the damages which plaintiff is entitled to recover, they should confine themselves to such sum as will fairly compensate the plaintiff for physical and mental suffering, if any, caused by the injury, and for any permanent impairment of his capacity to earn money, if any, that may have been caused by and directly resulted from the injury complained of; and their finding should be based upon the evidence in the cause as to each of the elements which the court has instructed you should be considered in arriving at the amount of your verdict.

In estimating these damages the jury are not at liberty to compensate him for loss of time or expenses incurred on account of his injury it appearing from the evidence that he was paid his  
617 wages during the time he wasn't working on account of the injury and did not lose any money, and that all his expenses incident to the injury were also paid by the defendant."

40. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The jury are further instructed that in cases of this kind the defendant is not liable for vindictive damages, but only for such damages as are compensatory and fairly compensate the injured party for such injuries as he may have actually sustained, if any, and for his physical and mental suffering, if any of either, as the result of the injury, and for the permanent impairment, if any, of his capability to earn money, that may have been caused by and directly resulted from the injury complained of, but the court further instructs the jury that if the evidence does not show that the plaintiff's earning capacity has been diminished, then they should not take this into consideration in arriving at the amount of their verdict."

41. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The jury are further instructed that to entitle the plaintiff to recover in this case, he must satisfy you that the injuries complained of resulted from the negligence of the defendant and that at the time of the accident plaintiff was without any fault or negligence which proximately entered into and contributed to his injuries, for is at that time his negligence proximately contributed to his injuries it would defeat his right to recover."

"Negligence, in a legal sence, has been defined to be the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demanded, whereby such other person suffers injury."

42. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

618 "The court instructs the jury that it is the duty of the

defendant to use ordinary care in furnishing a proper cooker and appliances which were reasonably safe and suitable for the purpose for which they were intended to be used; but the jury are further instructed that if they believe from a preponderance of the evidence that the accident was occasioned by any defect in the cooker furnished which was not known to the defendant, or any of its officers or agents, and that the plaintiff as well as the officers and superintendent, or manager of the defendant, had equal opportunity to know the dangerous condition of the cooker used, then the plaintiff assumed the risk of the employment in which he was engaged and the defendant is not liable."

43. The court erred in refusing to instruct the jury at the request of the defendant, as follows:

"The jury are further instructed that it was the duty of the defendant to use ordinary care to see that the cooker used by the plaintiff was reasonably safe and suitable for the purpose for which it was intended to be used; nevertheless, if the jury believe from a preponderance of the evidence, that the injury was caused not by any defect to which the attention of the defendant had been called and the repair of which had been attempted, as shown by the evidence, by patches, but some other defect which caused the accident, before the accident actually happened, it would not render the defendant liable, if the jury further believe from a preponderance of the evidence that within a reasonable time after its attention had been called to the general defective condition, if any, of the cooker, defendant had taken steps to remedy the same with a reasonable promptness and as soon as the same could have been reasonably remedied; and if the plaintiff continued in the employment of the defendant, with full knowledge of the facts and circumstances, and without any specific promise on the part of the defendant to remedy such general defect, then the defendant is not liable and they should find a verdict for the defendant."

44. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

619 "The court instructs the jury that the defendant was required to use only ordinary care in furnishing a reasonably safe and suitable cooker for the purpose for which it was intended



to be used. What is ordinary care cannot be determined abstractly. It is necessarily a relative term, it must be measured by the nature of the work to be done, the instruments to be used, the hazard and peril of the situation. The law by 'ordinary care' means simply the caution and vigilance which reasonable and prudent men exercise under like circumstances. The jury are further instructed that in the exercise of ordinary care, the employer does not become an absolute insurer of the safety of the employe; nor is he bound under all circumstances to provide for him the most approved or best improved machinery and equipments, or such as are absolutely safe. His care in this respect is ordinary precaution."

45. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The court instructs the jury that if the present case you should find from the evidence that the plaintiff on the day that he is alleged to have signed the release offered in evidence was delirious or his mental faculties were otherwise obscured by the injuries from which he was suffering,—still this would not necessarily prevent him having sufficient capacity to execute such release. Delirium or obscuration of the mental faculties by disease or injury must be so complete and so becloud the mind that the person entering into a contract sought to be impeached for want of capacity to make the same does not understand the nature of the business in which he is engaged and does not understand at the time of executing the instrument, substantially the act, and the extent of his rights and the effect of the instrument upon his rights.

The jury are further instructed that the burden of showing that the plaintiff's mental faculties were so affected by delirium, or were so obscured by the effect of the injury which he had received, as to so completely becloud the plaintiff's mind that he did not understand

620 the nature of the business in which he was engaged and the effect of the release which he alleged to have signed, upon his rights, is upon the evidence that such a state of facts is established, then they should find a verdict in favor of the defendant."

46. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The Court instructs the jury, that in all cases involving questions of sanity and insanity, prima facie, the person is sane, and when there is only evidence sufficient to raise a doubt of a person's insanity, the presumption in favor of sanity must prevail. When an instrument is made by a person of competent age, and under no legal disability, it will be taken and held to be valid and binding until incompetency is established, by a preponderance of the evidence."

47. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The jury are further instructed that if they believe from a preponderance of the evidence that the plaintiff had his mental faculties about him and understood the nature of the act which he is alleged to have done, in signing the release offered in evidence, and so understanding the same, gave his assent to the execution of the said

release by touching the pen, knowing that his name was signed to the same, thereby adopted the signature of his name signed thereto, and they should find a verdict in favor of the defendant."

48. The court erred in refusing to instruct the jury, at the request of the defendant, as follows:

"The jury are further instructed that it is not necessary that the plaintiff should have actually signed his own name to the instrument offered in evidence as a release. If the plaintiff, knowing the nature of his act, with mental capacity sufficient to understand what he was doing, at the time that the same was presented to him, touched the pen and thereby assented to the execution of the said instrument, such touching of the pen and assent has the same effect in law as if he had signed his own name thereto."

621 49. The Court erred in refusing to instruct the jury, at the request of the defendant, as follows:—

"The defendant asks the court to instruct the jury:—that if the plaintiff knew the terms of the release substantially, although he may not have had a copy of it, and had reason to believe or knew that the weekly wages paid him were being paid in consequence of the release that he had signed, then the acceptance of such weekly wages was a ratification of his act, although he may not have been conscious and rational at the time that he signed the release."

50. The Court erred in receiving the verdict of the jury; the jury having separated without the direction of the court and a sealed verdict being returned into court.

51. The court erred in receiving the sealed verdict of the jury; the jury having separated before the returning of the verdict into court; the said defendant not having consented to the separation of the jury before the rendition of the verdict and the return of the same into court.

52. The court erred in overruling the motion of the defendant to enter judgment in said cause in its favor upon the special findings of the jury returned into court.

53. The court erred in overruling the motion of the defendant for a new trial.

54. The court erred in entering and rendering judgment on the general verdict of the jury.

55. The court erred in not rendering judgment in favor of the defendant upon the special findings.

E. W. DOBSON.

MARRON & WOOD.

*Attorneys for Appellant.*

which said assignment of error was and is endorsed on the back thereof as follows to-wit:—"No. 1230. In the Supreme Court Territory of New Mexico, Joseph Schmidt, Appellee vs. Southwestern Brewery & Ice Co., Appellant. Assignment of Errors. Filed in my office this April 30, 1908. Jose D. Sena, Clerk.

622 And afterwards, on to wit, on the twenty-eighth day of August, 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion to affirm

in the above entitled cause, which said motion to affirm, was and is in the following words and figures towit:—

In the Supreme Court, Territory of New Mexico, January Term,  
A. D., 1910.

No. 1230.

JOSEPH SCHMIDT, Appellee,  
vs.  
SOUTHWESTERN BREWERY & ICE CO., Appellant.

Appeal from District Court, Bernalillo County.

*Motion to Affirm.*

Comes now appellee, Joseph Schmidt, by Neill B. Field, his attorney, and moves the Court to examine the record in the above entitled cause, and to affirm the judgment of the Court below, therein, for the reason that although the appeal in said cause was granted on the 24th day of December 1907, and a printed transcript therein was served on counsel for appellee on the 15th day of May, 1908, the appellant has failed to file in the office of the Clerk of this Court or to serve on counsel for appellee any brief or argument in support of the said appeal ten days before the 31st day of August, 1908, on which day the said cause was argued, or up to the time of the filing of this motion.

NEILL B. FIELD,  
*Attorney for Appellee.*

which said motion to affirm was and is endorsed on the back thereof as follows to wit: "No. 1230—Territory of New Mexico in the Supreme Court of New Mexico—Joseph Schmidt, Appellee vs. Southwestern Brewery & Ice Co., Appellant—Motion to Affirm—Filed in my office this August 28th, 1908. Jose D. Sena, Clerk. Neill B. Field, Albuquerque, N. M., Attorney for Appellee.

623 And heretofore, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D., 1908, on the thirteenth day of the said regular term, the same being Tuesday, the 1st day of September, A. D., 1908, the following among other proceedings were had and entered of record, following to wit:

No. 1230.

JOSEPH SCHMIDT, Appellee,

vs.

SOUTHWESTERN BREWERY &amp; ICE COMPANY, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming before the court upon the motion of appellee herein for affirmance and the court being sufficiently advised in the premises denies the said motion: It is therefore considered by the court that the motion of appellee for affirmance herein be and the same hereby is denied.

This cause coming on for argument upon the transcript of record assignment of errors and briefs of counsel, is submitted to the court on briefs, and the court not being sufficiently advised in the premises takes the same under advisement. It is ordered that the appellee do have thirty days from this date to file his brief and the appellant thirty days thereafter to reply.

And afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the First Monday in January A. D., 1910, on the second day thereof, the same being Thursday the 6th day of January A. D., 1910, the following among other proceedings were had and entered of record to wit:—

624

No. 1230.

JOSEPH SCHMIDT, Appellee,

vs.

SOUTHWESTERN BREWERY &amp; ICE COMPANY, Appellant.

Appeal from District Court, Bernalillo County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Parker, Chief Justice Mills and Associate Justices McFie, Pope and Mechem, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Bernalillo, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, it is considered and adjudged by the court that Joseph Schmidt, appellee herein do have and recover of and from the Southwestern Brewery and Ice Company, as principal, and of and from Henry Leeb, Don J. Rankin, and Otto Deiekman, as sureties on the appeal bond, the sum of Six thousand, five hundred and eighty nine dollars and seventy cents, together with interest at the rate of six per cent per annum from the 24th day of December,

A. D., 1907, (the same being the date of the entry of judgment in the court below,) until paid, together with his costs in this behalf expended to be taxed, for which let execution issue.

And afterwards, on to wit, on the 15th day of January A. D., 1910, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for rehearing in the above entitled cause, which said motion for a rehearing, was and is in the following words and figures towit:—

625 Territory of New Mexico, Supreme Court, January Term,  
1910.

No. 1230.

JOSEPH SCHMIDT, Appellee,

vs.

THE SOUTHWESTERN BREWERY & ICE COMPANY, Appellant.

And now comes the Southwestern Brewery and Ice Company, appellants in the above entitled cause, and moves the Court for a reconsideration of the appeal herein, and for grounds of the said motion, this appellant respectfully specifies:—

1. That in the consideration of the cause, and as appears from the opinion rendered by the Court in affirming the same, the Court overlooked and misapprehended the contention of the appellant mentioned in Point one (1) of the original Brief, and particularly set forth in Point one (1) of appellant's reply Brief, to the effect that this being an action in negligence, some actionable negligence must be established on the part of the appellant before any liability can be predicated, and that the fourth special finding of the jury negatives the existence of such negligence.

2. That the Court misapprehended and overlooked the contention of the appellant as set forth under Point One (1) of his reply Brief; that before there can be any recovery in this action, the plaintiff must establish that the cooker supplied by the defendant, and the breaking of which caused the injury, was so far defective that a reasonably prudent man would not have used it, or supplied it for use, that being the measure of the master's duty to his servant, at common law; and that any defect less serious than this in the cooker would not make the defendant liable in negligence, even though it had promised to correct such defect.

3. That the Court overlooked and misconceived the rule of law as sustained by the authorities cited under Point one (1) of his reply  
626 brief, to the effect that a promise to repair made by a master  
will not create a liability unless the defect which the master  
promised to repair was in itself sufficiently serious to amount  
to negligence.

4. That the ruling of the Court as set forth in its opinion is in substance that:

It appearing that the cooker was somewhat, no matter how slightly, dangerous or defective, the appellee having continued to

use it, relying upon the master's promise to repair, the master during a reasonable period thereafter became, in the absence of contributory negligence, an insurer of the servant's safety, as against the defect complained of, and the fact that the defect was not of such a character that legal negligence could have been predicated thereon, in the absence of such a promise, is no defense or excuse.

Which rule is contrary to the whole trend and current of judicial authority on the question of negligence, and must have been the result of a mis-apprehension by the Court of appellant's contention, and of the facts in the case.

5. That the Court, in the third paragraph of the opinion, while apparently sustaining appellant's contention that the Court should have instructed the jury that the burden of proof was on the plaintiff to show himself incompetent at the time he executed the release of his cause of action, overlooked and mis-apprehended the facts set forth in the record upon which said contention was based, in that the Court states in the opinion that the Trial Court did instruct the Jury, "That the burden was on the plaintiff to establish such disability"; specifying the tenth and eleventh instructions, as containing that charge. That it appears in the record that there is no instruction numbered eleventh, and that neither in the tenth, nor any other instruction contained in the charge, were the jury instructed that the burden of proof was upon the plaintiff, as suggested in the opinion of the Court, and the Court must have read the requested instruction which was refused under the misapprehension that it was the instruction given.

6. That by order made by this Court, on motion of the appellee, the appellant was required to submit this cause on Briefs  
627 without argument of said appeal, and apparently entirely overlooked the replying Brief submitted on behalf of the appellant; and appellant respectfully requests that said replying brief be considered, as submitted to the Court in support of this motion, and respectfully requests the Court to carefully examine the same upon the points presented by this motion, to the end that full and careful consideration of the serious questions presented by this appeal may be had by the full Court and after oral argument thereof.

MARRON & WOOD,

*Attorneys for Appellant.*

which said motion for rehearing was and is endorsed on the back thereof as follows to-wit: "No. 1230—In the Supreme Court, January Term, 1910.—Joseph Schmidt, Appellee, vs. Southwestern Brewery & Ice Company, appellant.—Motion for rehearing—Filed in my office this Jan. 15, 1910, Jose D. Sena, Clerk.

And afterwards, on the third day of the said regular term, A. D. 1910, the same being Monday February 28th A. D. 1910, the following among other proceedings were had and entered of record to-wit:

No. 1230.

JOSEPH SCHMIDT, Appellee,

vs.

SOUTHWESTERN BREWERY &amp; ICE COMPANY, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon the motion of appellant in the above entitled cause for a rehearing herein, and the court having had the said motion under advisement and being now sufficiently advised in the premises, denies said motion. It is therefore considered and adjudged by the court that the motion for rehearing in the above entitled cause be and the same hereby is overruled and denied.

628 And afterwards, on to wit, on the fifteenth day of March, A. D. 1910, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a petition for writ of error, and assignment of errors in the above entitled cause, which said petition for writ of error and assignment of errors, was and is in the following words & figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1230.

THE SOUTHWESTERN BREWERY AND ICE COMPANY, Appellant,

vs.

JOSEPH SCHMIDT, Appellant.

Appeal from District Court, Bernalillo County.

*Petition for Writ of Error.*

Your petitioner, The Southwestern Brewery & Ice Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the Supreme Court of the Territory of New Mexico, and that a judgment has been rendered on the 6th day of January, 1910, affirming a judgment of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo; and that the matter in controversy in said suit exceeds five thousand dollars (\$5,000.00) besides costs; and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and

Therefore, your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause, directed to the Clerk of the Supreme Court of the Territory of New Mexico, to send the

record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herein filed by said plaintiff in error may be reviewed; and if error be found, corrected according to the laws and customs of the United States.

THE SOUTHWESTERN BREWERY AND ICE  
COMPANY, *Plaintiff in Error*,  
By MARRON & WOOD, *Their Attorneys*.

The foregoing petition is granted and writ of error allowed as prayed for, upon the plaintiff giving bond according to law in the sum of fifteen Thousand Dollars (\$15,000.00).

(Signed)

WILLIAM H. POPE.

*Chief Justice of the Supreme Court of the  
Territory of New Mexico.*

TERRITORY OF NEW MEXICO:

In the Supreme Court.

No. 1230.

THE SOUTHWESTERN BREWERY AND ICE COMPANY, Plaintiff in  
Error,

vs.

JOSEPH SCHMIDT, Defendant in Error.

Appeal from District Court, Bernalillo County.

*Assignment of Errors.*

And now comes the plaintiff in error, The Southwestern Brewery and Ice Company, by Marron & Wood, its attorneys, and say that in the record and proceedings aforesaid, of the said Supreme Court of the Territory of New Mexico, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error, in this to-wit:

1. The said Supreme Court of the Territory of New Mexico erred in entering judgment affirming the judgment of the District Court of the Second Judicial District of the Territory of New Mexico, for Six Thousand, Five Hundred Eighty-nine Dollars and Seventy cents (\$6,589.70), and costs of suit, entered on December twenty-fourth, 1907, in said District Court, in favor of said defendant in error, and against said plaintiff in error.

2. Said Supreme Court of the Territory of New Mexico  
630 erred in not reversing the said judgment of the District Court for the Second Judicial District of the Territory of New Mexico aforesaid, and in not remanding said cause to said District Court for a new trial.

3. Said Supreme Court of the Territory of New Mexico, erred in



holding that the special findings of fact made by the jury in trying said cause sufficient to sustain the judgment rendered against the plaintiff in error.

4. Said Supreme Court of the Territory of New Mexico erred in refusing to direct the judgment in favor of the plaintiff in error, upon the said special findings of the jury upon the trial of the cause.

5. That the Supreme Court of the Territory of New Mexico erred in not sustaining each and every of the assignments of error filed therein, by and on behalf of the plaintiff in error, and particularly the following numbers,—four (4), seven (7), fifty-two (52), fifty-three (53), fifty-four (54), and fifty-five (55).

6. The said Supreme Court of the Territory of New Mexico erred in rendering judgment against the plaintiff in error, and in favor of said defendant in error, for costs of suit in said Supreme Court.

Wherefore, the said The Southwestern Brewery and Ice Company, plaintiffs in error, pray, that for the errors aforesaid, and other errors appearing in the record of said Supreme Court of the Territory of New Mexico, and in the District Court aforesaid, as assigned in the assignment of errors, filed in the Supreme Court of the Territory of New Mexico, in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said Supreme Court of the Territory of New Mexico, be reversed, annulled, and for naught esteemed, and that said cause be remanded to the Supreme Court of the Territory of New Mexico, with instructions to grant a new trial in said cause, and for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

MARRON AND WOOD.

*Attorneys for Plaintiff in Error.*

631 which said Petition for writ of error and assignments of error was and is endorsed on the back thereof as follows to-wit: "No. 1230. In the Supreme Court, Territory of New Mexico, The Southwestern Brewery and Ice Co., Plaintiffs in error, vs. Joseph Schmidt, Defendant in Error. Petition for writ of error and assignments of error. Filed in my office this Mar. 15, 1910. Jose D. Serna, Clerk. Marron & Wood, Albuquerque, N. M., Attorneys for Plaintiff in error.

And afterwards on to wit, on the 15th day of March A. D. 1910, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico a Supercedens Bond on writ of error, which said Supercedens Bond on writ of error was and is in the following words and figures to-wit:

Know all men by these presents, That we, The Southwestern Brewery and Ice Company, as principal, and Don Rankin and Harry Rankin as sureties, are held and firmly bound unto Joseph Schmidt in the full and just sum of Fifteen Thousand Dollars (\$15,000.00), to be paid to the said Joseph Schmidt, his certain

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attorneys, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this Fourteenth day of March, in the year of our Lord, One Thousand Nine Hundred Ten.

Whereas, lately in the Supreme Court of the Territory of New Mexico, in a suit pending in said Court, between Joseph Schmidt, appellee, and The Southwestern Brewery and Ice Company, appellant, a judgment was rendered against the said The Southwestern Brewery & Ice Company, and the said The Southwestern Brewery and Ice Company having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph

Schmidt, citing and admonishing him to be and appear at 632 a session of the Supreme Court of the United States, to be holden at the City of Washington, sixty days from date of said citation which said citation has been duly served.

Now, the condition of the above obligation is such, that if the said The Southwestern Brewery and Ice Company, shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

THE SOUTHWESTERN BREWERY AND ICE  
COMPANY.

By OTTO DIECKMANN, *President*,

By D. J. RANKIN, *Secretary*.

[SEAL.]

HARRY RANKIN.

D. J. RANKIN.

[SEAL.]

[SEAL.]

Sealed and delivered in the presence of—

FRANCIS E. WOOD.

TERRITORY OF NEW MEXICO,

*County of Bernalillo, ss:*

On this fourteenth day of March, A. D. 1910, before me came personally Don Rankin and Harry Rankin, who are respectively to me known to be the persons described in and who executed the foregoing instrument of writing as principals thereto; and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein set forth; and the said Don Rankin and Harry Rankin, being respectively by me duly sworn, each for himself, and not one for the other, says that he is a resident and free-holder of the said County of Bernalillo, and that he is worth the sum of Fifteen Thousand Dollars (\$15,000.00) over and above his just debts and legal liabilities, and exclusive of property exempt by law from levy and sale under execution.

HARRY RANKIN.

D. J. RANKIN.

Acknowledged, subscribed and sworn to before me this fourteenth day of March A. D. 1910.

[SEAL.]

E. L. REYNOLDS,  
*Notary Public.*

My Commission expires Aug. 3, 1913.

633 TERRITORY OF NEW MEXICO,  
*County of Bernalillo, ss:*

On this Fourteenth day of March, 1910, before me came personally Otto Dieckmann and Don Rankin, the President and Secretary, respectively, of the Southwestern Brewery and Ice Company, a corporation, who as said President and Secretary, executed the foregoing instrument in writing for and on behalf of the said corporation; and acknowledged that they executed the same as the free act and deed of said corporation for the purpose therein set forth; and being by me duly sworn, says, the said Otto Dieckmann that he is the President, and the said Don Rankin, that he is the Secretary, respectively of The Southwestern Brewery and Ice Company, a corporation; that the seal affixed to said instrument is the corporate seal of said corporation, and was affixed thereto by virtue of a resolution of the Board of Directors of said corporation; and that they each and severally signed said instrument as officers of the said corporation as therein recited, by virtue of like resolution of the Board of Directors.

OTTO DIECKMANN.  
D. J. RANKIN.

Acknowledged, subscribed and sworn to before me this Fourteenth day of March, A. D. 1910.

[SEAL.]

E. L. REYNOLDS,  
*Notary Public.*

My Commission expires, Aug. 3, 1913.

The Above and foregoing Bond is hereby approved, both as to form, manner of execution and the sufficiency of sureties thereon.

JOHN R. McFIE,  
*Associate Justice of the Supreme Court of New Mexico.*

Dated Santa Fe, N. M., March 15th, 1910.

634 which said Supercedeas Bond on writ of error was and is endorsed on the back thereof, as follows, to wit:—"No. 1230—In the Supreme Court Territory of New Mexico,—The Southwestern Brewery and Ice Company, Plaintiff in error vs. Joseph Schmidt, Defendant in Error—Supercedeas Bond on Writ of Error,—Filed in my Office this Mar. 15, 1910. Jose D. Sena, Clerk,—Marron & Wood, Albuquerque, N. M. Attorneys for Plaintiff in error.

And heretofore, on to wit, on the sixth day of January, A. D., 1910, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the Court in the

above entitled cause, which said opinion by the court was and is in the following words and figures towit:

635 In the Supreme Court of the Territory of New Mexico.  
January Term, A. D., 1910.

No. 1230.

JOSEPH SCHMIDT, Appellee,

vs.

SOUTH WESTERN BREWERY & ICE Co., Appellant.

Appeal from District Court, Bernalillo County.

*Opinion of the Court.*

PARKER, A. J.:

This is an action for damages for personal injuries. It appears that plaintiff below was a brewer engaged in brewing beer for defendant below. In the course of his duties he used a covered kettle or cooker in which the materials for the manufacture of beer were cooked under steam pressure. Several months prior to the action, plaintiff noticed a leak in the cooker and called defendant's attention to the same and requested that it be repaired. Defendant requested plaintiff to examine the cooker, which he did, and repaired the same with a patch. The Cooker still leaking, plaintiff by order of defendant, removed the patch and applied white lead, after which the leak was stopped. This was about three or four weeks before the accident and at that time defendant's foreman, when his attention was called to the defect, stated to plaintiff that they had to brew a couple of times more until the new bottom was installed and instructed plaintiff to put on the other patch and to proceed with the use of the cooker. Afterwards another leak appeared and was, by common consent, repaired by the plaintiff in the same manner. The cooker still continuing to leak and *plaintiff* still urging plaintiff to continue to use the cooker, about the last of November or the first of December 1905 a boiler maker was summoned and, in pursuance of his opinion as to the requirements in the way of repairs, a new bottom for the cooker was ordered. Plaintiff testified that the day of the accident, January 2nd, 1906, he had another talk with the foreman and asked him "if that kettle ever got fixed  
636 and he answered me the same way back again—that it ought to have been fixed before; it generally takes two or three or four months before we ever get something *down* in this foundary." It appears from the testimony that plaintiff relied on the promise of repair and would not have remained in the service but for such promise. The jury found specially that the cooker, at the time of the accident, was not in such bad condition and state of repair that a man of ordinary care, prudence and precaution would have refused to use the same, thus absolving plaintiff of contributory negligence in that regard. The jury found specially that defendant was

guilty of negligence in failing to repair the cooker when required.

We have, then, a case of defective appliance known to both master and servant; the defective appliance not so palpably dangerous from the defect as that an ordinarily prudent, careful and cautious man would refuse to use it; and promise of the master to repair and a request by the master to the servant to use the appliance until repair; a reliance upon the promise of the master to repair by the servant; and injury to the servant by means of the defective appliance. Under such circumstances it is clear that the master is liable. *Sherman & Redfield on Neg. sec. 215; Hough v. R. R. Co., 100 U. S. 213; R. R. Co. vs. Young, 49 Fed. 723; Gowen vs. Harley, 56 Fed. 973; Detroit Crude Oil Co. vs. Grable 94 Fed. 73; Chicago etc. Co., vs. Van Dan 36 N. E. 1024; Breckenridge Co., vs. Hicks 22 S. W. 554; Lutz vs. Ry. Co., 6 N. M. 496.*

1. Defendant predicates its first contention upon an alleged conflict between the special findings of the jury of negligence on its part in failure to repair and the special finding that the appliance was not so palpably dangerous as to preclude its use by a reasonably prudent person, and the general verdict for plaintiff. It is perfectly apparent, however, that the contention is unsound and based upon an erroneous view of the law. During the running of the promise to repair a known defect the master's liability is a continuing one and the servant, relying upon the promise, may recover in case of accident resulting from the defect, although obvious, if the claim to damage is otherwise well founded. If the performance of the promise to repair is unreasonably delayed the servant may, under some circumstances, be held to have assumed the risk of the employment, and if the defect renders the service so imminently dangerous that no prudent person would continue in it, the servant is guilty of contributory negligence or has assumed the risk and cannot recover. Thus the master is liable, during the running of his promise to repair a known defect, in all cases unless the servant, either by continuing the service and unreasonable length of time or by the use of the appliance when in an imminently dangerous condition has by him own conduct released the master.

2. The second contention of defendant is that the Court refused certain instructions offered. They were based upon the proposition that the master's liability is limited to the injuries caused by the particular defect covered by the promise to repair and were, no doubt, sound, if applicable. But they presented a proposition having no application to this case. As before seen, the defect covered by the promise was a defective bottom for the cooker and it was not confined to any particular crack or defect therein. The proofs show that the injury was caused by the defective bottom of the cooker. There was, therefore, no error in the refusal of the instruction.

3. The defendant complains of the refusal of the Court to give requested instructions that the burden of proof was on the plaintiff to show himself incompetent at the time he executed a release of his cause of action to the defendant. We fail to understand how such complaint could be made here in view of the tenth and eleventh instructions of the Court, which fully and correctly explain the

nature of the mental disability necessary to be present in order to avoid the release; and direct *them* that the burden was on the plaintiff to establish such disability.

4. Defendant complains of the refusal of the Court to give requested instructions on the subject of contributory negligence of a servant in using an appliance of an imminently dangerous character. The action of the Court was correct in this regard. The contributory negligence of plaintiff pleaded and relied on by defendant was the alleged negligent method of the use of the appliance and had no reference to the subject covered by the requested instruction.

5. The defendant complains of the Court's instruction as to the measure of damages and of its refusal to give requested instructions on that subject. It appears that from the time of the action down and to about two months before the trial, (when plaintiff voluntarily left the employ of defendant) defendant paid him the same amounts per month as he had formerly received and even slightly increased the same during part of the time. Defendant presented an instruction expressly excluding from the jury any consideration of loss of wages prior to the trial which, of course, if no other consideration intervened, would be correct. But it appears from a release of his cause of action by plaintiff to defendant, which defendant pleaded and relied upon, that the wages paid him during the time he was actually incapacitated from any labor were paid as a part of the consideration for said release and not as wages. It thus appears that there was loss of time to be compensated by defendant to plaintiff and the instruction given by the Court of its own motion, which permitted compensation for loss of time prior to the trial was correct. Counsel for defendant seek to put upon the instruction given by the Court a construction which we do not think it will bear and which is to the effect that it authorized the jury to award to the plaintiff damages for loss of time at a rate of wages or compensation different or greater than the plaintiff's earning capacity was shown by the evidence to be. An examination of the instruction, however, shows that the same taken in connection with the evidence, will not bear such a construction.

6. Defendant complains that the verdict is excessive. The jury awarded seven thousand five hundred dollars (\$7500.00) less nine hundred ten dollars and thirty cents (\$910.30) which had been paid by defendant for medical and hospital fees and expenses and monthly allowance during the time plaintiff was wholly incapacitated. Plaintiff was scalded by the boiling contents of the cooker. He exhibited his hands to the jury and testified that he could no longer work as formerly because his hands were stiff; that he could not take hold of anything and hold it tight; that his fingers were stiff and that when the weather changed they were in worse condition; that at times they felt paralyzed; that he suffered so much pain that he was unable to sleep at night. Defendant produced medical testimony to the effect that plaintiff was fully restored and as capable as before the accident. The Court submitted to the jury the question of damages for past and future loss of earning power and past and future pain and suffering. The jury found, as

before stated. We are unable to say that the award was above the actual loss. The condition testified to was of such a character, if true, as necessarily to be more or less permanent, and the jury alone were to choose between the testimony of the plaintiff and that of the physician who testified for the defendant.

There being no error in the record the judgment of the Court below will be affirmed, and

It is so ordered.

(Signed)

FRANK W. PARKER.

*Associate Justice.*

We concur

(Signed)

WILLIAM J. MILLS, C. J.

"

JOHN R. McFIE, A. J.

"

WM. H. POPE, A. J.

"

MERRETT C. MECHEM, A. J.

Abbott, A. J., having tried the case below, did not participate in this decision.

640 TERRITORY OF NEW MEXICO,

*Supreme Court, ss:*

I, José D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the foregoing six hundred and thirty nine pages contain a full, true and perfect copy of the record and proceedings, pleadings and opinion filed in the above entitled cause, which is transmitted to the Supreme Court of the United States, in accordance with the writ of error hereto attached.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 12th day of April, A. D., 1910.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,

*Clerk Supreme Court, N. M.*

641 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment in a plea which is in the said Supreme Court, before you, wherein The Southwestern Brewery & Ice Company was appellant, and Joseph Schmidt, was appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, sixty days from the date hereof.

that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 15th day of March A. D., 1910.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,

*Clerk Supreme Court of New Mexico.*

Allowed

WILLIAM H. POPE,

*Chief Justice, etc.*

Filed in my office this Mar. 15, 1910.

JOSÉ D. SENA, *Clerk.*

642 The United States of America to Joseph Schmidt, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to a writ of error, filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, wherein The Southwestern Brewery & Ice Company was appellant, and you were appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as — the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico this the 16th day of March A. D., 1910.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM H. POPE,

*Chief Justice Supreme Court of N. M.*

I hereby acknowledge service of a copy of the foregoing citation this 8th day of April 1910.

NEILL B. FIELD,

*Att'y for Defendant in Error.*

643 TERRITORY OF NEW MEXICO,

*Supreme Court, ss:*

I, the undersigned, Clerk of the Supreme Court of the Territory of New Mexico, do hereby make return to the within writ of error by transmitting to the Supreme Court of the United States, a true copy of the record and proceedings in the cause therein mentioned, under my hand and the seal of the Supreme Court of the Territory



of New Mexico. I do further certify that the original writ of error and the original citation with the acknowledgment of service thereon are hereto attached and herewith returned.

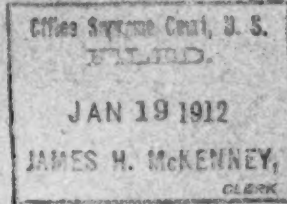
Witness My hand and the seal of the Supreme Court of the Territory of New Mexico this the 12th day of March, A. D., 1910.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,  
*Clerk Supreme Court of N. M.*

Endorsed on cover: File No. 22,168. New Mexico Territory Supreme Court. Term No. 282. The Southwestern Brewery and Ice Company, Don J. Rankin, Henry Loeb, and Otto Dieckmann, plaintiffs in error, vs. Joseph Schmidt. Filed May 13th, 1910. File No. 22,168.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. ~~200~~ 55.

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THE SOUTHEASTERN BREWERY & ICE CO.  
PLAINTIFF IN ERROR,

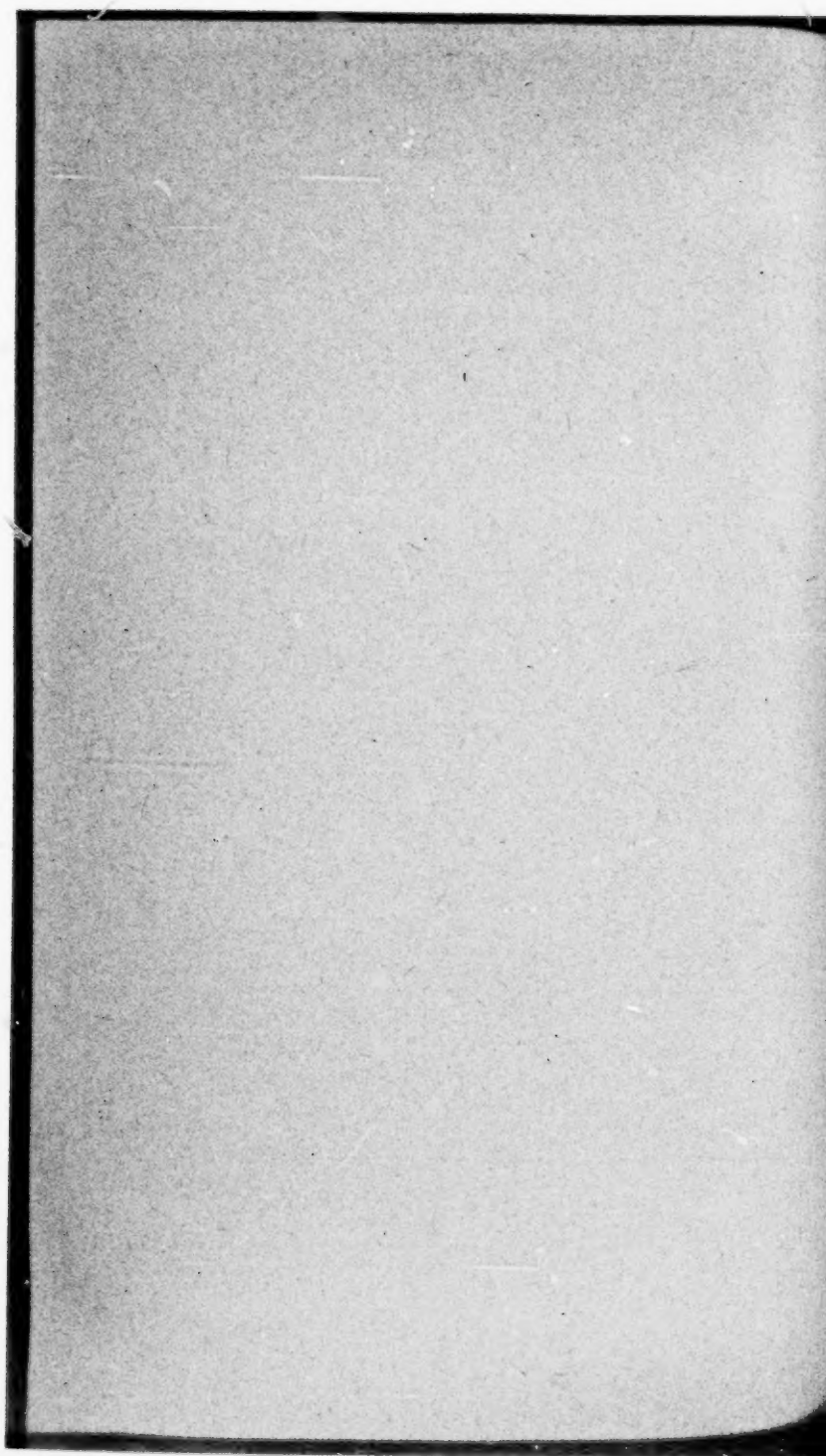
vs.

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JOSEPH SCHMIDT,  
DEFENDANT IN ERROR.

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BRIEF OF PLAINTIFF IN ERROR ON MOTION TO  
AMEND WRIT OF ERROR AND SUBSEQUENT PRO-  
CEEDINGS BY ADDING DON J. RANKIN, HENRY  
LOEBS, AND OTTO DIECKMANN, AS PARTIES PLAIN-  
TIF.



United States Supreme Court

THE SOUTHWESTERN BREWERY & ICE CO., Plaintiff in Error,

vs.

JOSEPH SCHMIDT, Defendant in Error.

*Brief of Plaintiff in Error on Motion to Amend Writ of Error  
and Subsequent Proceedings by Adding Don J. Rankin,  
Henry Loeb, and Otto Dieckman, as Parties Plaintiff.*

The facts disclosed by the motion papers are as follows: Joseph Schmidt brought an action against the Southwestern Brewery & Ice Co. in the District Court for the Second Judicial District of the Territory of New Mexico and recovered a judgment for \$6589.70. The Company appealed from said judgment to the Supreme Court of the Territory of New Mexico and gave a supersedeas bond, signed by itself as principal and Don J. Rankin, Henry Loeb and Otto Dieckmann as sureties. The appeal was duly heard in the Supreme Court of New Mexico and a decision was rendered affirming the judgment on the 6th day of January, 1910. A motion for a re-argument and a re-hearing of the appeal was duly filed in said Supreme Court and taken under advisement by the Court and on the 28th of February, 1910, the Supreme Court of New Mexico rendered a decision denying and overruling the motion.

Sec. 41 of Chapter 57 of the Laws of New Mexico for 1907 reads as follows: "Sec. 41. Judgment against sureties. If the judgment of the appellate court be against the appellant, or plaintiff in error it shall be rendered against him and his sureties on the appeal bond." Pursuant to the provisions of this section the judgment in the Supreme Court was entered against the Southwestern Brewery & Ice Co. and also against Don J. Rankin, Henry Loeb and Otto Dieckmann, as sureties.

While this judgment is joint in form against all the sureties, under the laws of New Mexico it is not so in fact. Sec. 3118 of the Compiled Laws of 1897 provides "No execution shall issue against any security on any promissory note, bond, bond for costs, appeal bond, or other obligation for the payment of money or property until execution shall have been first issued against the principal in any such note or obligation and levied upon all the real estate or other property of said principal which may be within the jurisdiction of the court in which the judgment may have been rendered."

The section contains a further provision that where an affidavit which would be sufficient to authorize an attachment against the surety upon an original case is filed that then execution may issue against the sureties simultaneously with that against the principal.

The plaintiff in error, the Brewery, overlooked this provision in the statute and the form of the judgment against the sureties, and understanding that the Brewery alone was the proper party to sue out the writ of error, the sureties omitted to join in the writ.

The time within which the sureties could sue out a writ of error, or the plaintiff in error could sue out an additional writ, will not expire until the 28th day of February, 1912, and attention of the plaintiff in error having been called to the probable necessity of joining the sureties with him, he files this motion to amend and the sureties come into court with their petition likewise asking the amendment and that they be made parties to the writ of error.

## I.

The court has power to amend the writ of error as sought in this motion under the provisions of Sec. 1005 of the revised statutes.

The identical situation here presented was before the Supreme Court in the *Inland & Seaboard Coasting Co. against Tolston*, 136 U. S. 572. There, as here, the judgment appealed from was rendered against the appellant in the court below and the sureties on his supersedeas bond pursuant to the statute. The writ of error was sued out in the name of the principal alone, the sureties not joining and the cause was first dismissed for failure to join the sureties. On motion the writ was amended so as to add the sureties and the case restored to the calendar.

To like effect are the cases of *Knickerbocker vs. Pendleton*, 112 U. S. 696; *Moore vs. Simmons*, 100 U. S. 145.

## II.

The effect of denying the motion would be merely to compel a suing out of another writ by the sureties in which the principal could join and further postponement; and merely add to the delay and annoyance and expense of all parties with no right or justice to any.

The motion should be granted.

Respectfully submitted,

O. N. MARRON,

FRANCIS E. WOOD,

*Attorneys for Plaintiff in Error.*

Office Supreme Court, U. S.  
FILED.

DEC 23 1911

JAMES H. MCKENNEY,  
CLERK.

## MOTION PAPERS

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### SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. ~~54~~ 55.

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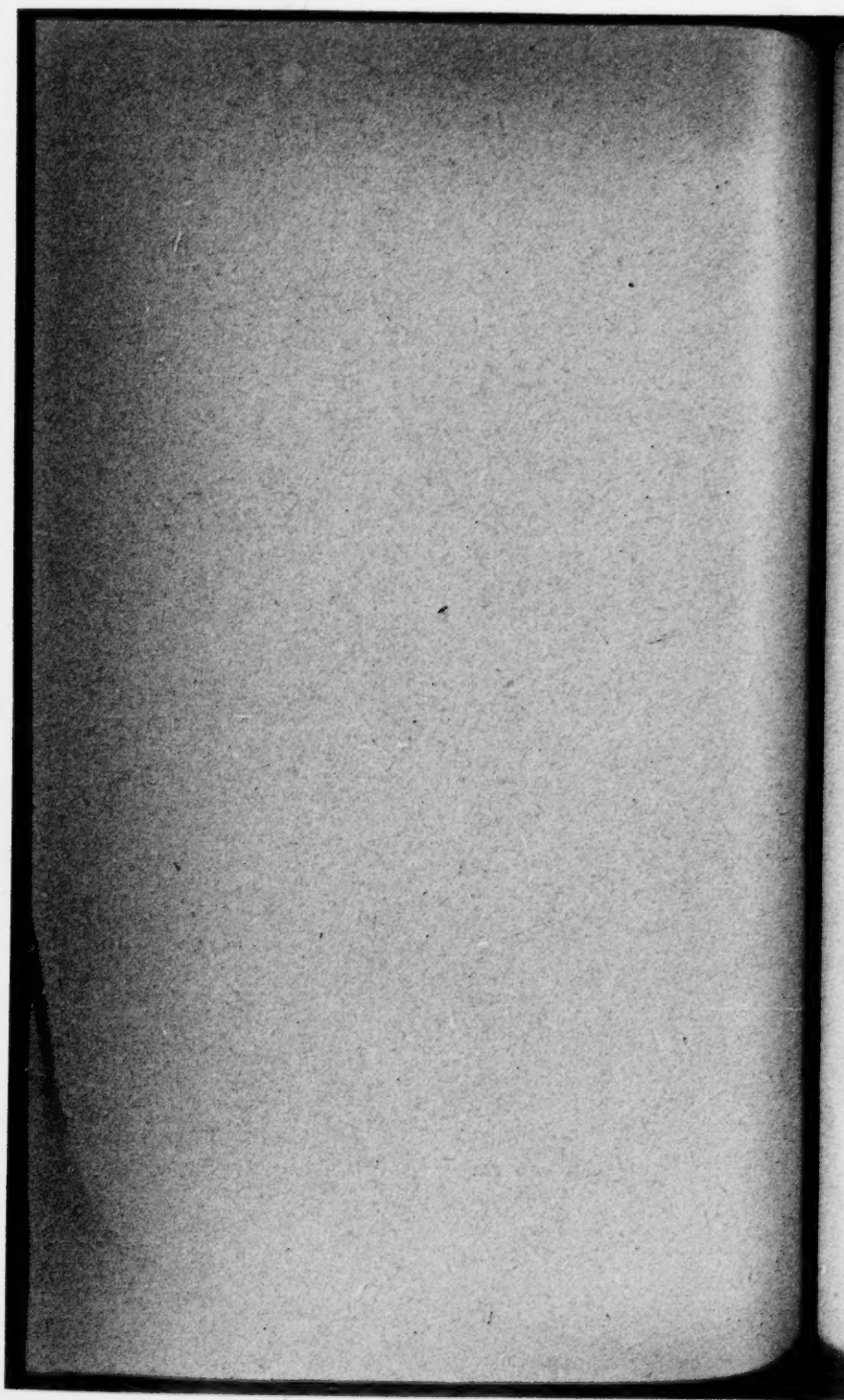
THE SOUTHEASTERN BREWERY & ICE CO.  
PLAINTIFF IN ERROR,

vs.

JOSEPH SCHMIDT,  
Defendant in Error.

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ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.





# MOTION PAPERS

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## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 282

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THE SOUTHEASTERN BREWERY & ICE CO.  
PLAINTIFF IN ERROR,

*vs.*

JOSEPH SCHMIDT,  
Defendant in Error.

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ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.



Supreme Court of the United States, October Term, 1911.

SOUTHWESTERN BREWERY & ICE Co., Plaintiff in Error,

*vs.*

JOSEPH SCHMIDT, Defendant in Error.

You will please take notice that the above named plaintiff in error will call up the motion to amend the writ of error in the above entitled cause heretofore filed by him before the Supreme Court of the United States for a hearing upon Monday, the fifteenth day of January, 1912, at the rooms of said Court in the City of Washington, at the opening of court on said day or as soon thereafter as counsel can be heard, and will read, upon said motion, the original motion filed therein, the petition of Don J. Rankin and others dated December 4th, 1911, the affidavit of Otto Dieckmann, verified December 4th, 1911, copies of which have been heretofore served upon you and the affidavit of Francis E. Wood, verified January 5th, 1912, with a copy of which you are herewith served.

And you will further please take notice that the plaintiff in error having been unable to arrange with counsel to call up said motion on January 8th, 1912, for which day he has heretofore noticed the same, hereby withdraws his notice to call up the motion on that date and will call up the same instead upon the date herein given.

Dated this 5th day of January, 1912.

Yours, etc.

O. N. MARRON,

FRANCIS E. WOOD,

*Attorneys for Plaintiff in Error.*

To Neill B. Field, Attorney for Defendant in Error.

Supreme Court of the United States, October Term, 1911.

SOUTHWESTERN BREWERY & ICE Co., Plaintiff in Error,

*vs.*

JOSEPH SCHMIDT, Defendant in Error.

TERRITORY OF NEW MEXICO, *County of Bernalillo, ss.*

Francis E. Wood, being duly sworn says he is one of the attorneys for the plaintiff in error in this cause. That the judgment of the Supreme Court of the Territory of New Mexico, which is brought up for review upon this writ of error was entered January 6th, 1910. That thereafter the plaintiffs in error duly filed with the Supreme Court of New

Mexico a motion for a re-argument and re-hearing of the Appeal upon which said judgment was entered and the said motion was received and taken under advisement by the Court and held until 28th day of February, 1910, when a final order was made by said Court denying and overruling the motion for a re-hearing.

The said judgment of the Supreme Court of New Mexico took effect as a final judgment of said Court and the time to appeal and review the same became effective and commenced on the said 28th day of February, 1910.

FRANCIS E. WOOD.

Subscribed and sworn to before me this 5th day of January, 1912.

VIOLA A. JONES,

(SEAL)

*Notary Public, Bernalillo Co., N. M.*

My commission expires Sept. 16, 1915.

STATE OF NEW MEXICO, *Bernalillo County, ss*

Viola A. Jones being duly sworn says that on the fifth day of January, 1912, she served the annexed notice and affidavit upon Neill B. Field, the attorney for the defendant in error in this cause, by delivering to and leaving with him, at his office in the City of Albuquerque, New Mexico, a true copy thereof.

And that said deponent is more than twenty-one years of age and resides in the said City of Albuquerque, and further deponent sayeth not.

VIOLA A. JONES.

Subscribed and sworn to before me this 6th day of January, 1912.

O. N. MARRON.

(SEAL)

*Notary Public, Bernalillo Co., N. M.*

My commission expires Apr. 11, 1914.

Supreme Court of the United States, October Term, 1911.

No. ....

TERRITORY OF NEW MEXICO, *County of Bernalillo, ss.*

*vs.*

JOSEPH SCHMIDT, Defendant in Error.

You will please take notice that the plaintiff in error will call up a motion to amend the writ of error in the above entitled cause before the Supreme Court of the United States for a hearing upon Monday, the 8th day of January, 1912, at

the rooms of said Court in the City of Washington at the opening of Court on said day or as soon thereafter as counsel can be heard, and in the event the Court will not be in session upon said day then upon the first Monday, or motion day, thereafter in which said Court shall be in session.

Dated this 15th day of December, 1911.

Yours, etc.,

O. N. MARRAN,

F. E. WOOD,

*Attorneys for Plaintiff in Error.*

To Neill B. Field, Attorney for Defendant in Error.

Supreme Court of the United States. October Term, 1909.

No. 282.

SOUTHWESTERN BREWERY & ICE Co., Plaintiff in Error,

*vs.*

JOSEPH SCHMIDT, Defendant in Error.

Comes now the Southwestern Brewery & Ice Co., the plaintiff in error in this cause, by O. N. Marron and F. E. Wood, its attorneys, and move the Court for leave to amend the writ of error granted and filed herein so as to join and unite as parties, plaintiff in error, under said writ, Don J. Rankin, Henry Loebs and Otto Dieckmann and that the said writ and all other proceedings had herein may be and stand amended by adding the names of the said parties as plaintiffs in error herein.

And for grounds of this motion, the plaintiff in error respectfully shows:

That said Southwestern Brewery & Ice Co. was the sole defendant in the district court and the sole party against whom judgment was rendered in the district court.

That an appeal having been taken from the judgment of the district court to the Supreme Court of New Mexico, the other parties, to-wit, Don J. Rankin, Henry Loebs and Otto Dieckmann executed the bond on said appeal as sureties.

That under the provisions of the New Mexico statute the Supreme Court of New Mexico in affirming the judgment of the district court, rendered the judgment against the sureties as well as the principal and the judgment of the Supreme Court of New Mexico from which this writ of error has been prosecuted is against the Southwestern Brewery & Ice Co., Don. J. Rankin, Henry Loebs and Otto Dieckmann.

That the Southwestern Brewery & Ice Co., the plaintiff in error, was not aware of the necessity of joining the sureties on the bond in the original appeal against whom judgment was rendered in the Supreme Court as parties, plaintiff in this writ of error, until recently and immediately upon being advised by its attorneys that these parties were probably necessary parties to the writ of error, under the rules and practice in the Supreme Court of the United States, makes this application for leave to unite said parties.

And that annexed hereto is the petition of the said parties for leave to be united as plaintiffs in error in the writ heretofore issued.

O. N. MARRON AND  
FRANCIS E. WOOD,

*Attorneys for plaintiff in Error.*

Supreme Court of the United States. October Term, 1909.

SOUTHWESTERN BREWERY & ICE Co., Plaintiff in Error,

*vs.*

JOSEPH SCHMIDT, Defendant in Error.

TERRITORY OF NEW MEXICO, *Bernalillo County, ss.*

Otto Dieckman, being duly sworn, says that he is the officer, to-wit the president of the Southwestern Brewery & Ice Co. That he has heard read the motion to amend the writ of error hertofore annexed and knows the contents thereof and that the facts therein stated are true to the knowledge of deponent.

(Signed) OTTO DIECKMANN.

Subscribed and sworn to before me this 4th day of February, 1911.

(Signed) VIOLA A. JONES,

(SEAL)

*Notary Public, Bernalillo Co., N. M.*

My commission expires Sept. 16, 1915.

Supreme Court of the United States. October Term, 1909.

SOUTHWESTERN BREWERY & ICE Co., Plaintiff in Error,

*vs.*

JOSEPH SCHMIDT, Defendant in Error.

TO THE UNITED STATES SUPREME COURT:

The Petition of Don J. Rankin, Henry Loebbs and Otto Dieckmann respectfully shows:

That upon the 24th day of December, 1907, in an action pending in the District Court for the Second Judicial District of the Territory of New Mexico within and for the County of Bernalillo, Joseph Schmidt, the defendant in error in the above cause recovered a judgment against the Southwestern Brewery & Ice Co., the plaintiff in error therein, in the sum of \$6589.70.

That the said Southwestern Brewery & Ice Co. duly appealed from the said judgment to the Supreme Court of the Territory of New Mexico and executed a supersedeas bond upon said appeal by the said Southwestern Brewery & Ice Co. as principal and your petitioners as sureties.

That thereafter and on the 6th day of January, 1910, the Supreme Court of New Mexico rendered judgment affirming the judgment of the district court as aforesaid, which said judgment in form was rendered not only against the Southwestern Brewery & Ice Co., but also against your petitioners as sureties upon said bond under and pursuant to the provisions of the laws of New Mexico relating to appeals.

That thereafter the Southwestern Brewery & Ice Co. duly petitioned for and was allowed a writ of error from this Court directed to the Supreme Court of the Territory of New Mexico to review the judgment of said court affirming the judgment of the district court and return has been duly made upon said writ and the cause is now pending in the Supreme Court of the United States.

That your petitioners respectfully desire to be made parties plaintiff upon the said writ of error and that all the proceedings upon said writ stand amended by inserting the names of these petitioners as plaintiffs therein.

Dated this fourth day of December, 1911.

(Signed) DON J. RANKIN.

(Signed) HENRY LOEBBS.

(Signed) OTTO DIECKMANN.

TERRITORY OF NEW MEXICO, *County of Bernalillo, ss.*

Don J. Rankin, Henry Loebbs and Otto Dieckmann being severally duly sworn, each for himself deposes and says that he is a resident of the County of Bernalillo and the Territory of New Mexico. That he has read the foregoing petition, by him subscribed and knows the contents thereof and that the same is true to the knowledge of deponent.

(Signed) DON J. RANKIN.

(Signed) HENRY LOEBBS.

(Signed) OTTO DIECKMANN.

Subscribed and sworn to before me this fourth day of December, 1911.

VIOLA A. JONES,

(SEAL)

*Notary Public.*

My commission expires Sep. 16, 1915.

TERRITORY OF NEW MEXICO, *Bernalillo County, ss.*

Viola A. Jones being duly sworn says that on the 18th day of December, 1911, she served the annexed notice, petition and affidavit upon Neill B. Field, the attorney for the defendant in error in this cause, by delivering to and leaving with him, at his office in the City of Albuquerque, New Mexico, a true copy thereof.

And that deponent is more than twenty-one years of age and resides in the said City of Albuquerque, and further deponeth sayeth not.

(Signed) VIOLA A. JONES.

Subscribed and sworn to before me this 18th day of December, 1911.

(Signed) O. N. MARRON,

(SEAL)

*Notary Public, Bernalillo Co., N. M.*

My commission expires Apr. 11, 1914.

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FILED

JAN 22 1912

JAMES H. MCKENNEY,

CLERK

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1911.**

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**No. ~~500~~ 55.**

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**THE SOUTHWESTERN BREWERY & ICE  
COMPANY, PLAINTIFF IN ERROR,**

**vs.**

**JOSEPH SCHMIDT.**

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**IN ERROR TO THE SUPREME COURT OF THE TERRITORY  
OF NEW MEXICO.**

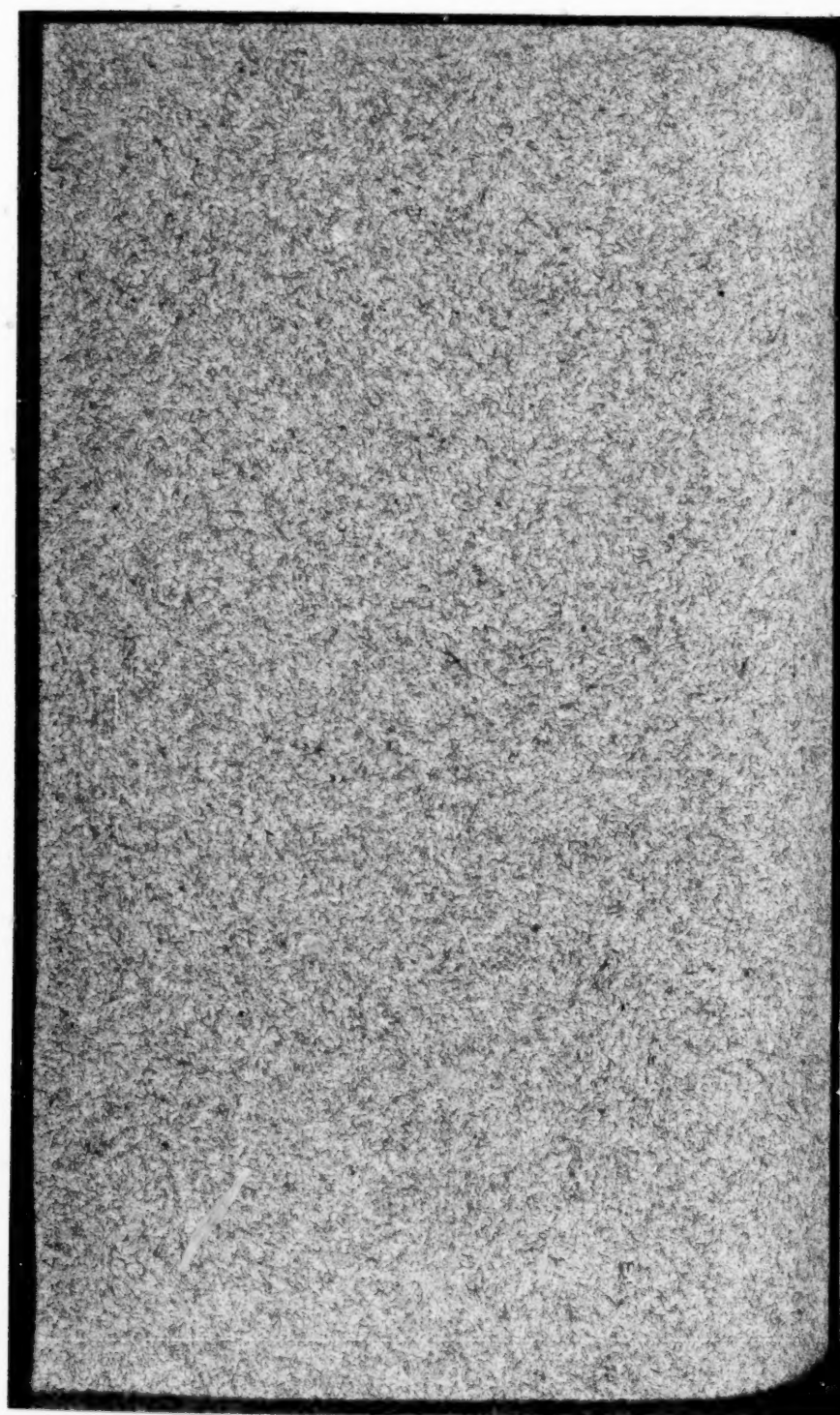
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**BRIEF ON BEHALF OF THE DEFENDANT IN  
ERROR IN OPPOSITION TO THE MOTION TO  
AMEND THE WRIT OF ERROR.**

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**NEILL B. FIELD,  
JOSEPH W. COX,  
JOHN A. KRATZ, Jr.,**  
*For Defendant in Error.*







SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

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No. 282.

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THE SOUTHWESTERN BREWERY & ICE  
COMPANY, PLAINTIFF IN ERROR,

*vs.*

JOSEPH SCHMIDT.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY  
OF NEW MEXICO.

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**BRIEF ON BEHALF OF THE DEFENDANT IN  
ERROR IN OPPOSITION TO THE MOTION TO  
AMEND THE WRIT OF ERROR.**

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**Statement.**

The plaintiff in error on August 18, 1906, was sued in the District Court for the County of Bernalillo, Territory of New Mexico, by the defendant in error to recover damages for personal injuries received by him through the negligence of the plaintiff in error in the operation of its

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plant. The trial resulted in a verdict for the defendant in error. Motion for a new trial was duly made by the plaintiff in error, and overruled and judgment upon the verdict entered on December 24, 1907. From this judgment the plaintiff in error appealed to the Supreme Court of the Territory of New Mexico. On February 8, 1908, a supersedeas bond was executed, with the plaintiff in error as principal and Don J. Rankin, Henry Loebs, and Otto Dieckman as sureties. On January 6, 1910, the Supreme Court of the Territory of New Mexico affirmed the judgment of the District Court, and it is that judgment of the Supreme Court of the Territory of New Mexico which it is sought by this proceeding in error to reverse. The judgment is as follows:

“It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Bernalillo, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, it is considered and adjudged by the court that Joseph Schmidt, appellee herein, do have and recover of and from the Southwestern Brewery and Ice Company, as principal, and of and from Henry Loebs, Don J. Rankin, and Otto Dieckman, as sureties on the appeal bond, the sum of six thousand five hundred and eighty-nine dollars and seventy cents, together with interest at the rate of six per cent per annum from the 24th day of December, A. D. 1907 (the same being the date of the entry of judgment in the court be-

low), until paid, together with his costs in this behalf expended to be taxed, for which let execution issue."

On the 15th day of March, 1910, *The Southwestern Brewery & Ice Company*, plaintiff in error, petitioned the Supreme Court of the Territory of New Mexico for a writ of error to have the case reviewed by this court. The petition, in its material parts, is as follows:

"Your petitioner, The Southwestern Brewery & Ice Company, plaintiff in error in the above-entitled cause, respectfully shows, etc. \* \* \*

"Therefore, *your petitioner* would respectfully pray that a writ of error be allowed *it* in the above-entitled cause," etc.

The following endorsement appears on the petition:

"The foregoing petition is granted and writ of error allowed *as prayed for*, upon the plaintiff giving bond according to law in the sum of fifteen thousand dollars (\$15,000.00)."

On March 15, 1910, The Southwestern Brewery and Ice Company, as principal, and Don Rankin and Harry Rankin, as sureties, gave bond in the sum of \$15,000.00, conditioned that "*the said The Southwestern Brewery and Ice Company* shall prosecute said writ of error to effect and answer

all damages and costs, if *it* fail to make *its* plea good." The recital in the bond is:

"Whereas, lately in the Supreme Court of the Territory of New Mexico, in a writ pending in said court, between Joseph Schmidt, appellee, and The Southwestern Brewery and Ice Company, appellant, a judgment was rendered against the said The Southwestern Brewery & Ice Company, and *the said The Southwestern Brewery and Ice Company having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph Schmidt, citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, sixty days from date of said citation, which said citation has been duly served.*"

The writ of error sued out is as follows:

"Because of the record and proceedings, as also in the rendition of the judgment in a plea which is in the said Supreme Court, before you, wherein The Southwestern Brewery & Ice Company was appellant, and Joseph Schmidt was appellee, *a manifest error hath happened, to the great damage of the said appellant, as by his (its) complaint appears.*

"We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then," etc.

The citation was issued and service of the citation acknowledged by counsel for the defendant in error; the transcript of record was filed, but has not been printed, and the case docketed.

On January 5, 1912, the plaintiff in error, by its counsel, served notice on the defendant in error, through his counsel, that on January 15, 1912, a motion would be made to amend the writ of error in this cause. With the notice there was served a copy of the motion. By this motion the plaintiff in error asked leave of the court to amend the writ of error granted to it—

“So as to join and unite as parties plaintiff in error, under said writ, Don J. Rankin, Henry Loeb, and Otto Dieckman, and that the said writ and all other proceedings had herein may be and stand amended by adding the names of the said parties as plaintiffs in error herein.”

Annexed to the motion is a petition of said Don J. Rankin, Henry Loeb, and Otto Dieckman for leave to be united as plaintiffs in error.

**ARGUMENT.****I.**

*The Defect of Parties Plaintiff in Error Cannot be Cured by Amendment.*

A writ of error could not be amended, at common law, in any respect (*Thompson vs. Crocker*, 1 Salk., 49; *Walter vs. Stokoe*, 1 Lord Raym., 71).

The right to amend the writ of error here, therefore, must depend upon the statute.

Until the enactment of section 1005, R. S., which became the law on the 1st of June, 1872 (17 Stats., 196), it was not in the power of this court to supply the defect in the statement of the parties to an action in a writ of error even from the record. *A fortiori*, it was not in the power of the court to so amend the proceedings in error as to allow additional plaintiffs in error to be made parties to the suing out of the writ.

Section 1005, Revised Statutes, is as follows:

“The Supreme Court may, at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of

the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: *Provided*, The defect has not prejudiced, and the amendment will not injure the defendant in error."

The question presented is whether the defect in the present writ of error sought to be remedied by amendment is a defect in the statement of the title of the action or parties thereto in the writ. The difficulty with the application here made to amend the writ is that it seeks to cure not a defect in the statement of the parties to the action below, but a defect in the parties who prosecute the writ of error. The defect in the writ of error is that all the defendants did not join. This defect cannot be cured by reference to the record, because it affirmatively appears from the writ itself (Brief., p. 4) and from the bond (Brief, p. 4) that it was prosecuted and sued out by only The Southwestern Brewery & Ice Company, one of the defendants against whom judgment was rendered below. To amend the writ, therefore, so as to show that it was sued out by all of the defendants below, would be to amend the writ in contradiction of the record, and not in accordance with what it shows. It seems clear, therefore, that to grant such an amendment as is now requested would be in violation of, rather than in accordance with, section 1005, R. S., and this court

has heretofore declined to permit such an amendment in analogous cases.

The case of *Estis vs. Trabue*, 128 U. S., 225, is directly in point. In that case the judgment of the court below was against the claimants, Estis, Doan & Co., and C. F. Robinson and John W. Dillard, their sureties, in their forthcoming bond. The writ of error was taken out in the name of Estis, Doan & Co., as plaintiffs in error, against Trabue, Davis & Co., as defendants in error, without setting out in the writ the names of the individuals who composed either of the firms. It was held that, as the record showed the individual members of the firms, the expression "& Co." in the writ of error was not a fatal defect, but that the names of the parties might be supplied from the record.

But it was distinctly held that the non-joinder of the sureties in the prosecution of the writ of error, in the absence of a summons and severance, was a defect which was not amendable under section 1005, R. S. The court, through Mr. Justice Blatchford, said:

"But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against 'the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond,' jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment



against the claimants and another separate judgment against the sureties. In such a case the sureties have the right to a writ of error. *Ex parte Sawyer*, 88 U. S., 21 Wall., 235, 240.

"It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered. *Williams vs. Bank of United States*, 24 U. S., 11 Wheat., 414; *Owings vs. Kincannon*, 32 U. S., 7 Pet., 399; *Wilson vs. Life & Fire Ins. Co. of N. Y.*, 37 U. S., 12 Pet., 140; *Todd vs. Daniel*, 41 U. S., 16 Pet., 521; *Smyth vs. Strader*, 53 U. S., 12 How., 327; *Davenport vs. Fletcher*, 57 U. S., 16 How., 142; *Mussina vs. Cavazos*, 61 U. S., 20 How., 280, 289; *Sheldon vs. Clifton*, 64 U. S., 23 How., 481, 484; *Masterson vs. Herndon*, 77 U. S., 10 Wall., 416; *Hampton vs. Rouse*, 80 U. S., 13 Wall., 187; *Simpson vs. Greeley*, 87 U. S., 20 Wall., 152; *Feibelman vs. Packard*, 108 U. S., 14.

"Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. *Wilson vs. Life & Fire Ins. Co. of N. Y.*, 37 U. S., 12 Pet., 140. It will then, of its own motion, dismiss the case, without awaiting the action of a party. *Hilton vs. Dickinson*, 108 U. S., 165, 168."

In the case at bar the judgment (Brief, p. 2) is one in all respects like that in the Estis case. It is against The Southwestern Brewery & Ice Company and its sureties jointly for a definite sum of money. There is nothing distributive in the judgment, so that, to repeat the language of this court, "it can be regarded as containing a separate judgment against" The Southwestern Brewery & Ice Company "and another separate judgment against the sureties."

Again, in *Mason vs. United States*, 136 U. S., 581, the action was against the postmaster of Chicago and his sureties. The judgment was against the postmaster and five sureties. To this judgment two of the sureties sued out a writ of error, without joining the other parties, or summons and severance. More than two years after the entry of judgment motion was made for leave to amend the writ of error by inserting the names of such other parties. This court denied the motion and dismissed the writ of error. This case is referred to by this court with approval in *Dolan vs. Jennings*, 139 U. S., 385, 388.

The judgment in the record sent up in return to the writ is a judgment against the plaintiff in error and Henry Loebs, Don J. Rankin, and Otto Dieckman. It seems clear that a writ, sued out by only one of the defendants, cannot confer jurisdiction upon this court to review that judgment. To permit the amendment now requested would be equivalent to granting a new writ.

The four cases cited by the plaintiff in error in its brief in support of its motion are not applicable to a case like that at bar and are, we think, clearly distinguishable from it. In all of them an amendment to the writ of error was allowed, but an examination of the cases will show, we think, that the amendment was allowed in three of them because the defect could be "remedied by reference to the accompanying record," as provided by the statute, whereas, as we think we have shown, the amendment to the writ of error in the present case is sought to be made in contradiction "to the accompanying record." In the fourth case the situation presented was unlike that in the case at bar. The following are the cases cited by the plaintiff in error:

*Moore vs. Simmonds*, 100 U. S., 145.

*Knickerbocker vs. Pendleton*, 115 U. S., 339.

*Inland & Seaboard Coasting Co. vs. Tolson*, 136 U. S., 572.

*Walton vs. Chair Co.*, 157 U. S., 342.

In the Moore case the appeal was taken in the name of the firm when technically it should have been taken in the names of the individual members of the firm. Inasmuch, however, as the bond showed the names of the individuals of the firm in whose favor an appeal was allowed, the court held that it was a technicality which could be remedied by reference to the record.

In the Knickerbocker case it appeared that while a part only of the names of the plaintiffs below appeared as defendants in the writ, they did appear as obligees in the supersedeas bond and the amendment was made by reference to that part of the record.

The two cases last referred to are clearly cases where the amendment was made by reference to the accompanying record, as provided by section 1005. The inapplication of these two cases to the case at bar is demonstrated by the fact that if an attempt should be made to amend the writ by reference to the supersedeas bond to this court the effort would fail because only two of the three sureties against whom judgment was rendered below signed this bond, Henry Loeb, one of the sureties against whom judgment was rendered below not having done so either as principal or surety. Yet the motion seeks to make Henry Loeb a party plaintiff in error.

In the Walton case the amendment to the writ consisted simply in inserting the name of the present administrator of an estate as plaintiff in error in place of the name of the former administrator. In that case the accompanying record showed who the present administrator was and the court said:

“The case is clearly one in which ‘the statement of the title of the action or parties thereto in the writ is defective,’ and ‘in which the defect can be remedied by reference to the accompanying record.’ ”

The Tolson case is specially urged in support of the present motion, but we think that an examination of it discloses that the situation presented in that case distinguishes it from the case at bar as well as from the Trabue and Mason cases, *supra*, upon which we confidently rely. Furthermore, the facts of the Mason case are identical with the facts of the case at bar, and the decision of this court denying the motion to amend the writ was rendered subsequently to the decision in the Tolson case allowing the amendment.

## II.

*Even if the Court Could Otherwise Allow an Amendment, the Fact that the Statute Has Run Would Prevent Its Doing So in the Present Case.*

The judgment in this case was entered on January 6, 1910. The time within which a writ of error could be brought expired on January 6, 1912. The defect in the writ of error was jurisdictional. The Supreme Court had no power to hear the case. (*Estis vs. Trabue* and *Mason vs. United States, supra*; *Heirs of Wilson vs. Life & Fire Ins. Co.*, 12 Pet., 140.) Until a court has acquired jurisdiction to try a case, the running of the statute cannot be stopped, and an amendment to supply a jurisdictional defect, therefore, must be in the nature of a new suit. As the amendment here

asked for will supply a jurisdictional defect, it will be in effect a new writ of error, and that is barred by section 1008, R. S., which provides:

“No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order.”

### III.

*It is respectfully submitted that the motion to amend should be denied and the writ of error be dismissed.*

NEILL B. FIELD,  
JOSEPH W. COX,  
JOHN A. KRATZ, JR.,  
*For Defendant in Error.*

IN THE SUPREME COURT OF THE  
UNITED STATES

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SOUTHWESTERN BREWERY & ICE  
COMPANY, ET AL, *Plaintiffs in*  
*Error.*

VS.

JOSEPH SCHMITT, *Defendant in*  
*Error.*

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BRIEF OF PLAINTIFF IN ERROR.

Error to the Supreme Court of New Mexico to review a judgment granted Jany. 6th, 1910, affirming a judgment of the district court for the Second Judicial District of New Mexico sitting in Bernalillo County granted December 24th, 1907, and from the order denying the defendant's motion for judgment on special findings, specified in the assignments of error set forth in the record.

THE ACTION was brought to recover damages for personal injuries suffered by the plaintiff, while in defendant's employ, alleged to have been caused by the negligence of the defendant.

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THE PLEADINGS.

The complaint alleged in substance, that a boiler or cooking kettle, supplied by defendant for

plaintiff's use, in which materials for making beer were boiled, had become defective and unsafe; that plaintiff had called defendant's attention to the dangerous condition and was induced to continue to use it under defendant's promise to repair it, and while carefully using the kettle, pending such repairs, it broke and precipitated its scalding contents upon the plaintiff, permanently injuring him.

The answer (f. 7-8) denied any negligence on the part of the defendant in furnishing or using the kettle in question; and further set up a release by the plaintiff of all damages sustained by him.

By subsequent amendment made on the trial (f. 13, 74) a further defense of contributory negligence in unnecessarily subjecting the kettle to a dangerous degree of steam pressure was set up.

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#### STATEMENT OF FACTS.

The defendant is a corporation owning and operating a small brewery and ice manufacturing plant in the City of Albuquerque. The plaintiff had been engaged in working in breweries since he was thirteen years of age, and had worked for the defendant around and about the kettle in question, in various capacities for upwards of ten years (f. 104-5. Reference are to marginal numbers or folies) and used it exclusively from the middle of April, 1905, down to the time of the accident on January 2nd, 1906 (f.



107-8). He alone doing all the brewing of the company.

This kettle or cooker was a large affair, holding about sixty (60) barrels, made of  $\frac{3}{8}$ -inch boiler iron and fitted with a cover or manhole at the top which could be fastened down and cook, under steam pressure, the materials or mash as it was called, used in the manufacture of beer. An ordinary safety valve, consisting of a loose plug, held in place by a lever with a movable weight, was attached to the top of the cooker to regulate the pressure. The cooking was done by steam, conducted from the adjoining boiler house through two steam pipes, one entering the kettle at the bottom and the other farther up at one side, each having a shut-off valve close to the cooker and under control of the plaintiff, who thoroughly understood the use and operation of this kettle (f. 113).

The plaintiff testified that after he commenced using the kettle in April, 1905, that it was leaking and called the attention of one Loeb, defendant's general foreman, to the condition, and that he replied (f. 85), "The kettle has been leaking before—it is not so bad." Continuing, the plaintiff testified (f. 85), "I worked for another month I think it was I called his attention to it again. It commenced to leak more;" and that Loeb replied: "You have to look at it and see what is the matter with it."

The plaintiff then made an examination of the kettle and discovered a crack in the bottom, through which upon removing the woodwork underneath, he could see light. Continuing, he says, "I showed it to Mr. Loeb. I asked him—I told him I cannot make no beer that way. I ask him what he is going to do about it. He told that—middle of the summer time—business is rushing—we have to fix it the best way it goes. I asked him if I should put on an iron plate with a piece of packing on top and a bolt through and screw it on tight. He says I should do it."

The plaintiff repaired the kettle accordingly and found that it still leaked, and claims that he was then told by Mr. Loeb that he should take the patch off and put on white lead on top of the packing and that when the kettle got hot the lead would tighten into the kettle. He says (f. 87), "I done so and it was all right I brewed with that until Mr. Henry Loeb calls the boilermaker." The boilermaker did not come until late in November or early in December, 1905 (f. 199). After putting on the patch the plaintiff says he thought the pressure too great for the kettle; he says (f. 87): I asked Mr. Loeb or I told him—I told Mr. Loeb we have to take this pressure off it is too much and I am afraid I am going to get hurt. Then I put this other valve on that won't raise more than 12 pounds.

Q. Now, when was that, with reference to the time that the patch was put on? A. It was about two or three weeks afterwards; I had that patch on.

Q. When was the patch put on? A. It was about in June, I think."

Upon cross examination the plaintiff was asked as to the next conversation he had with Mr. Loebs about the kettle after the first patch was put on, and he testified (f. 140), "The next talk as I remember him—pretty near every week and told him—told the man to get it fixed."

Q. (f. 141) I asked you if you say that you ment to Mr. Loeb most every week until he sent for this boilermaker telling him that the cooker was not safe and asking him to have it repaired? A. Yes, sir.

Q. Is that a fact? A. Yes, sir.

Q. Well, what did Mr. Loebs says to you at these different times? nearly every week? A. He told me that we cannot repair it right now. In the middle of the summer and business is rushing and we have to wait until in the winter time, we get time.

The boilermaker, Mr. Ridley, was sent for and examined this boiler late in November or early in December, 1905 (f. 199), and a new bottom for the boiler was then ordered by the defendant.

The plaintiff further testified (f. 88): "In the meantime the cooker got another bad place about four feet away from the old patch. This bad

place was near on to the shelf from the cooker so it could hardly be repaired. When it commenced to show bad I called Mr. Loeb's attention to it and he told me, another kettle 'the bottom is already ordered for it' but we were short on beer at the same time. He said we have to brew a couple of times more by the time they have the bottom ready and the same time he told me to go ahead and fix it like you did the other way. I fixed it and it held for about four times, before the accident happened—that was three or four weeks before the accident happened."

The plaintiff further testified that on the day of the accident he had another talk with Mr. Loeb and asked him "if that kettle ever get fixed and he answered me the same way back again—that it ought to have been fixed before, it generally takes two or three or four months before we have got something done down in this foundry."

On the morning of January 2, 1906, while the plaintiff was using the cooker and had steam pressure on, the bottom cracked and spread and allowed some of its contents to be forced out into the room, scalding the plaintiff upon his hands, part of his head and on one knee.

After the injury, the plaintiff was taken to a hospital and four days later, on the 6th day of January, the defendant made him a proposition to the effect that it would pay all medical assist-

ance, hospital fees and medicine required and pay him his wages until he could return to work, if he would accept it in lieu of all claim for damages, because of his injuries. He accepted the proposition and as his hands were bandaged, authorized his name to be signed to an agreement accordingly. The defendant continued to carry out this agreement in full on its part, paid all medical and hospital expenses and paid to the plaintiff, his salary weekly, the same as when he was working, paying in all the sum of nine hundred ten (\$910) dollars, and in the middle of June, plaintiff was able to return to his work (f. 152) and continued to work for over a year thereafter, until he voluntarily quit, a short time before the trial in this cause.

Upon the trial the plaintiff claimed he knew nothing about the release, and had no recollection of having executed it while he was receiving this money or before. That his mind was so badly affected by his injuries that he remembered nothing that took place for about three months afterwards. He admitted, however, that at least five weekly payments by the defendant were received and accepted by him after he was told by Mr. Loeb that the defendant had a release signed by him.

In this state of the evidence the court was requested to instruct the jury that the plaintiff could recover nothing for loss of wages or earn-

ing capacity prior to the trial but the court refused so to instruct and instead instructed the jury they had a right to compensate the plaintiff for loss of wages and diminished earning capacity down to the time of the trial, to each of which the plaintiff excepted.

The court was requested to charge the jury that every man was presumed to be sane and the burden of showing mental incapacity was upon him who asserted it and in this case the burden was on the plaintiff to show that he was mentally incapable at the time the release was executed, and the court refused to so charge and the defendant excepted. The court charged instead that the release was invalid unless the jury was satisfied that at the time his signature was affixed thereto the plaintiff had rational knowledge of the fact *and effect* of what he was doing and unless he was then mentally capable of comprehending the nature *and effect* of such instrument, to the giving of which charge the defendant excepted.

The court was likewise requested to instruct the jury that even though the plaintiff was not mentally capable of executing a release at the time his signature was affixed thereto yet if afterwards he had information that such a release had been executed and that he was being paid his wages while not working by the defendant company, pursuant to such release, and accept-

ed these wages knowing they were being paid to him under the release it amounted to a ratification and approval of its terms. The court refused to so instruct the jury but instead instructed them that unless the plaintiff had full knowledge *and nuderstanding* of the contents and terms of the release at the time he accepted the consideration provided for by it, it did not amount to a ratification of its terms, and to this charge the defendant excepted.

The jury returned a verdict of \$7500.00, applied thereon the payments theretofore made by the defendant.

Several questions were submitted to the jury pursuant to the New Mexico statute authorizing such procedure and among other things, in answering these questions, they found that the cooker at the time of the accident was not in such dangerous condition that a reasonably prudent man would not have used it. That the plaintiff at all times had full knowledge of its actual condition and the defendant had no greater knowledge or means of knowledge of its condition than did the plaintiff and specifically that both of them knew accurately the condition of the cooker at that time.

Upon the strength of these findings the defendant moved for judgment which motion was overruled and the defendant excepted.

The defendant moved for a new trial specify-

ing all the foregoing matters and many others, which motion was overruled, exception duly taken and thereupon judgment was rendered for the plaintiff upon the verdict. Appeal was taken to the Supreme Court of the Territory of New Mexico and the judgment was affirmed by that court, to review which judgment of affirmance, this writ was sued out.

The plaintiff in this court assigns the following specifications of error:

Comes now, the plaintiffs in error in the above cause, by O. N. Marron and Francis E. Wood, their attorneys, and by way of amendment, and as additions to and in the nature of more particular specifications of errors alleged by them to have been committed by the district court and the Supreme Court of the Territory of New Mexico, as appears in the record proceedings and judgments of said courts, show to the Court here that in the record proceedings and judgment of the district court for the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo and in the record and proceedings and judgment of the Supreme Court of the Territory of New Mexico, affirming the aforesaid judgment of the district court there is manifest error in this, to-wit:

#### I.

The supreme court erred in affirming the judgment of the district court.



(11)

II.

The supreme court erred in not reversing the judgment of the district court.

III.

The district court erred in overruling the motion for judgment for the defendant on the special findings and the supreme court erred in refusing to consider said action as error.

IV.

The district court erred in overruling defendant's motion for a new trial and the supreme court erred in refusing to consider said action as error.

V.

The district court erred in overruling the defendant's objections to leading and suggestive questions, particularly specifying the following:

Q. State whether or not on the first day of January, Henry Loeb said to you that he wanted you to use that boiler for one or two more brewings? (Folio 93.)

Q. State whether or not the statement of Loeb to you that the bottom was ordered for the boiler; that it ought to have been fixed before that, and that he only wanted you to use it for one or two more brewings, had anything to do with your using the boiler on the second day of January? (Folio 95.)

and the supreme court erred in refusing to consider said rulings and each thereof as error.

VI.

The district court erred in instructing the jury as follows:

“The paper which has been offered in evidence before you as a release purports to have been signed by the plaintiff’s mark. A signature by mark is valid, if made by the direction of the signer, given with full knowledge of what he is doing and its effect, but not otherwise. If the signature of the plaintiff was put to the paper in question by mark in his presence but without his rational knowledge of the fact and effect of what he was doing, or if with rational knowledge that he was directly his mark to be affixed to a written instrument, but he was mentally incapable of comprehending and did not comprehend the nature and effect of such instrument, then it was not a valid release.” (Folio 560. Instruction 10.)

and the supreme court erred in refusing to consider said instructions as error.

VII.

The district court erred in giving instruction No. 12, folio 561, as follows:

“If, however, the alleged release was not valid at the outset, yet, if afterwards the plaintiff with full knowledge and understanding of its contents, accepted the consideration provided for by it, he is

not entitled to recover damages in this action. But if at the time of accepting such consideration or any part thereof, he did not know that the defendant was claiming to act in pursuance of the terms of the said release, was unaware of its terms until a copy of the same was filed, with the answer of the defendant in this case, and within a reasonable time after, he obtained knowledge of the terms of said release, he applied to the defendant in person or by his agent to be informed as to amount of the alleged disbursements claimed by the defendant to have been made by it in pursuance of the terms of the said release with the view of tendering to the defendant repayment of the same, and the defendant refused to inform the plaintiff as to the amount of such disbursement, and announced its determination to refuse to accept reimbursement at his hands, the plaintiff was under no obligation to pursue the matter further, and the fact that such disbursements were made by the defendant will not prevent the plaintiff from recovering in this action."

and the supreme court erred in refusing to consider said action as error.

#### VIII.

The district court erred in refusing defendant's proposed instruction No. 19, folio 574, as follows:

"The court instructs the jury that if in the present case you should find from the

evidence that the plaintiff on the day that he is alleged to have signed the release offered in evidence was delirious or his mental faculties were otherwise obscured by the injuries from which he was suffering—still this would not necessarily prevent him from having a sufficient capacity to execute such release. Delirium or obscuration of the mental faculties by disease or injury must be so complete and so becloud the mind that the person entering into such a contract sought to be impeached for want of capacity to make the same does not understand the nature of the business in which he is engaged and does not understand at the time of executing the instrument, substantially the act, and the extent of his rights and the effect of the instrument upon his rights.

“The jury are further instructed that the burden of showing that the plaintiff’s mental faculties were so affected by delirium, or were so obscured by the effect of the injuries which he had received, as to so completely becloud the plaintiff’s mind that he did not understand the nature of the business in which he was engaged and the effect of the release which he is alleged to have signed, upon his rights, is upon the plaintiff, and unless they believe from the preponderance of the evidence that such a state of facts is established, then they should find a verdict for the defendant.”

and the supreme court erred in refusing to con-

sider such refusal as error.

IX .

The district court erred in refusing to give the requested instruction No. 20, folio 574, as follows:

“The court instructs the jury, that in all cases involving questions of sanity and insanity, *prima facie*, the person is sane, and when there is only evidence sufficient to raise a doubt of a person's insanity, the presumption in favor of sanity must prevail. When an instrument is made by a person of competent age, and under no legal disability, it will be taken and held to be valid and binding until incompetency is established by a preponderance of the evidence.”

and the supreme court erred in refusing to consider such refusal as error.

X.

The district court erred in refusing to give defendant's proposed instruction No. 23, folio 575 as follows:

“The defendant asks the court to instruct the jury; that if the plaintiff knew the terms of the release substantially, although he may not have had a copy of it, and had reason to believe or knew that the weekly wages paid him were being paid in consequence of the release that he had signed, then the acceptance of such weekly wages was a ratification of

his act, although he may not have been conscious and rational at the time that he signed the release."

and the supreme court erred in refusing to consider said refusal as error.

XI.

The district court erred in giving instruction No. 13, folio 562, as follows:

"You are instructed that if you find the issues for the plaintiff you should assess his damages as such sum, not exceeding twenty-five thousand dollars, the amount claimed in the complaint, as you believe from the evidence will fully compensate him, so far as compensation in money may be made, for the injuries, if any, which he has received, and in assessing such damages you have a right to take into consideration plaintiff's loss of time, with reference to his condition and ability to earn money in his business or calling, his loss from the impairment, if any, of his capacity to earn money, such impairment, if any, be temporary or permanent, and also his physical pain, suffering and disfigurement, if any, resulting from such injuries. You may also consider whether or not the evidence satisfies you that the plaintiff is reasonably certain to suffer in the future as the result of his injuries, further physical pain and is reasonably certain to be physically unable to earn as much money as he was able to earn before the

accident, and may allow compensation for such future physical pain and impairment of his ability to earn money if the evidence justifies you in believing that the plaintiff is reasonably certain, in the future to suffer from such physical pain and to have his ability to earn money impaired as a direct result of such injuries. From the amount of damages, if any, to which upon the evidence and these instructions you may find the plaintiff is entitled, you should deduct the amount of disbursements by the defendant for the plaintiff, as detailed in the evidence, and which the plaintiff expresses his willingness to pay, namely the sum of \$910.30."

and the supreme court erred in refusing to consider said instruction as error.

## XII.

The district court erred in refusing to give plaintiff's requested instruction No. 13, folio 570, as follows:

"The court instructs the jury that if they find a verdict in favor of the plaintiff after considering all the evidence and the instructions of the court, in estimating the damages which plaintiff is entitled to recover, they should confine selves to such sum as will fairly compensate the plaintiff for physical and mental suffering, if any, caused by the injury, and for any permanent impairment of his capacity to earn money, if

any, that may have been caused by and directly resulted from the injury complained of; and their finding should be based upon the evidence in the cause as to each of the elements which the court has instructed you should be considered in arriving at the amount of your verdict.

"In estimating these damages the jury are not at liberty to compensate him for loss of time or expenses incurred on account of his injury, it appearing from the evidence that he was paid his wages during the time he wasn't working on account of the injury and did not lose any money, and that all his expenses incident to the injury were also paid by the defendant."

and the supreme court erred in refusing to consider such action as error.

### XIII.

The district court erred in overruling defendant's motion for peremptory instructions in its favor and the supreme court erred in refusing to consider said action as error.

While the errors have been set forth in full and it is not the intention of the defendant to waive any of them, the chief points involved can perhaps be better discussed under a few headings covering many of the assignments; and no discussion of the assignments *seriatim* will be attempted, the defendant referring to them and earnestly requesting their careful perusal by the



Court as additional argument to that hereafter detailed.

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POINT I.

**The trial court erred in refusing to grant defendants' motion for judgment in its favor on the special findings of the jury.**

Under this point our contention may be summarized briefly thus:

(a) This is an action in negligence, not on contract. To maintain it, the first step must be to establish some breach of duty, some actionable negligence on the part of the appellant.

(b) The duty which the complaint charges and which it was sought to convict the appellant with having neglected, was "to use reasonable care to furnish and provide to the said plaintiff a suitable and safe place in which to do his work, and suitable and safe appliances wherewith to do the same." The particular defect complained of was that the cooker was unfit for use (f. 2).

(c) The extreme limit of the master's duty in this regard is satisfied if the appliance supplied is such, and in such condition, that a reasonably prudent man would himself use it for the purpose.

(d) The jury has expressly found in its fourth special finding that

"The cooker which the plaintiff was

using at the time that the accident occurred (was not) in such a condition and state of repair that a man of ordinary care, prudence and precaution would not have used the same." (f. 53.)

(e) It follows from the foregoing that the general verdict for plaintiff is inconsistent with the special finding, and the special finding must prevail.

Sec. 2993 Comp. Laws of New Mexico of 1897 provides as follows:

"In all trials by jury in the district courts, the court shall at the request of the parties, or either of them, or their counsel, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

This section was examined and approved by this Court in *Walker vs. Southern Pacific Ry. Co.* 165 U. S. 593, and it was there held that effect must be given to it in accordance with its terms.

This, in brief, is our contention under Point I and sums up as follows: The negligence of the defendant is the first step to be established and the fourth special finding having negated that,

there is no support for the verdict.

The law imposed on the defendant in this case, only the obligation to use *reasonable and ordinary care and diligence* in keeping the cooker in a *reasonably safe condition* for use. It did not make him an insurer of the condition of the cooker or of the safety of the plaintiff. To make the defendant liable it must appear that it knew or should have known by a reasonable inspection and examination of the cooker that it was unsafe for use, and was likely to break and cause damage, and that a reasonably prudent and careful man would not have used it, or supplied it for use. The care necessary to be exercised by the defendant in determining whether or not the cooker was safe to use was such as a reasonably prudent man would exercise, if his own person were exposed to the danger.

“The law imposes on the master only the obligation to use reasonable and ordinary care, skill and diligence, in the matter of machinery and appliances and when he has done this he cannot be held liable for the consequence of a defect in the machinery or appliances used.

“The care which the master is required to exercise for the safety of his employees does not require that every possible danger be anticipated and guarded against, but only such as are likely to occur. The care necessary to be exercise it has been said, in such a

prudent man would exercise, if his own person were exposed, to the danger resulting from the use of the machinery or appliances furnished."

*20 A. & E. Enc. 74.*

"The master is bound to use ordinary care, diligence and skill for the purpose of protecting his servants from encountering unnecessary risks in his service, but he is not bound to use any high degree of care for this purpose."

*Sherman & Redf. on Negligence, Section 189, 4th Edition.*

"The duty of the master to furnish safe, suitable and sound tools, machinery and appliances for the use of the servant in the performance of the work of the master *and to keep them in repair* is not an absolute one and is satisfied by the exercise of reasonable care and prudence on the part of the master, in the manufacture, selection and repair of such appliances."

*Probst vs. Delamater, 100 N. Y. 272.*

"The defendant asked the court to give the following instruction which was refused: 'As respects the duty of a master or employer towards his servant or employe in his service, the court instructs the jury, as a matter of law that the master or employer is not bound to

provide machinery or appliances which are absolutely safe. The law imposes on the master or employer, only the obligation to use reasonable and ordinary care, skill, and diligence in procuring and furnishing suitable and safe machinery and appliances for the servant to perform the duties for which he is engaged. The master does not stand in the relation of an insurer to the servant, against injury, and can only be held chargeable when negligence can be properly imputed to him. The mere fact that an accident occurred, by which the plaintiff was injured, does not fix the liability or even raise a presumption that the defendant was at fault in providing machinery or appliances for the labor in which the plaintiff was engaged.' The defendant moved for a new trial and the motion was granted, on the ground that the court had erred in refusing to give the instruction above quoted. We think the instruction ought to have been given. When the employer exercises all the care and caution which a prudent man ordinarily take for the safety and protection of his own person under the same circumstances, he cannot be held liable for the consequences of a defect in the machinery or appliances used."

*Brymer vs. Southern Pac. Co., 27 Pacific Rep. 371-2.*

All the authorities are agreed that this rule applies as well to inspection and repair as to fur-

nishing the original instrument.

"It is not only the duty of a master to use ordinary care to furnish his servants with a reasonably safe place to work and with reasonably safe machinery and appliances, but he must also by inspection from time to time or by the use of ordinary care and diligence in making repairs keep them in a reasonably safe condition \* \* \* While a master is bound to keep his machinery in reasonably safe condition, he need not keep it in the best possible order."

*26 Cyc. 113-68.*

"Precisely the same duty is required of the master in keeping his appliances in repair, that he is required to exercise in furnishing them."

*La Batt on Master and Servant, Section 110.*

See also

*Moore vs. Wabash Ry. Co., 85 Mo. 588.*

*Bailey vs. R. W. & O. Ry., 139 N. Y. 302.*

Applying these rules to the facts in the case at bar, the plaintiff was entirely familiar with the cooker. He had had charge of it and used it for a year. He understood and appreciated the risk, as well as an ordinary prudent man could do. He knew the kettle was cracked and leaking in May, 1905, at least seven months before the in-

jury. He says at that time (f. 85):

"I called Mr. Henry Loebs' attention to it and first when I told him, he says, 'The kettle has been leaking before—taint so bad.'"

He worked for another month and saw it leaking more and again called the foreman's attention to it. At the foreman's request he cut the floor and exposed the exact condition of the kettle. There was a crack that let the light through and through which he says the mash had escaped and had formed a sour mass beneath the kettle. He showed the foreman this condition and said (f. 85): "I told him I can't make no beer that way. I asked him what he is going to do about it. He told me that—'middle of the summertime—business is rushing—we have to fix it the best way it goes.'"

The plaintiff himself suggested the repairs then necessary to be made and on receiving permission, went on and made them. He says (f. 85): "I asked him if I should put on an iron plate with a piece of packing on top and bolt through and screw it on tight—and he says I should do it."

This was in June, 1905, more than six months before the accident. He continued to use the cooker from that time until sometime late in November, or early in December, when a man (the witness Ridley), who was considered expert in such matters was called from the foundry to ex-

amine the cooker. The plaintiff was with this man during the examination and showed him the crack in the kettle and apparently knew as much, if not more, about it as the man who had come to make the examination. The went down into the cooker together by means of a ladder and the plaintiff thus describes their examination of the kettle (f. 455):

“Q. You showed him those patches? A. I showed him one. There was only one on there.

Q. You made a very thorough examination of the tank, with the old man Ridley? A. Yes, sir, while Mr. Loebs was there.

Q. Did you have any conversation with him about how to use the tank? A. Mr. Loebs asked him how the tank was. He took his hammer and tested it. He says, ‘It looks very thin around here.’

Q. He hammered it around everywhere? A. Not all around, just on the front side.

Q. He made a very thorough examination in it, didn’t he? A. I made the remark about the back side and I showed the old man that he should see in the back side. It looks kind of rusty, too. Then I asked this man if it is not better—his intention to put a patch on?

Q. You say his intention was to put only a patch on? How did you know it? A. Just cut a piece out of it where the bad places was and refit a new piece on.

Q. How did you know that? A. Well, because he said so already.

Q. What did you say when he said that? A. I told him, ‘You better look at the back side of it.



too, it looks kind of rusty.'

Q. Rusty inside? A. Inside the tank, yes, sir. He went over to look at it and he says, 'Yes, I think the best way is to put a whole new bottom in it.' "

With all this knowledge of the cooker, he continued to use it until some time in December, after Ridley had made the examination. Then he says, another leak or bad place appeared and the foreman told him (f. 89), "to go ahead and fix it like you did the other way. I fixed it and it held for about four times before the accident happened."

Ridley who inspected the cooker and who was called by the plaintiff as an expert in regard to its condition did not say a word to any one, either to the foreman or to the plaintiff, that the cooker was unsafe for use in its condition, as he found it. He testified (f. 402-3):

"Q. And you were doubtful about it when you went up there and looked at it. You were doubtful whether it would ever stand that amount of weight when you were up there, were you not? A. Well, no. I don't know that I was doubtful about the safety of it, provided there was no pressure.

Q. Did you ask anybody about how that cooker was used, when you were there? A. No, I did not.

Q. As to what use it was to be put it and how much weight it had to stand? A. No, I did not.

Q. As to whether there was any pressure to be—through those steam pipes? A. I did not ask any questions about pressure, because I had no idea there was pressure, never thought of such a thing.

Q. You told them nothing after you got through with it, did you? What did you say after you got through with your examination? A. I told them that it needed a new bottom that was all.

—Q. That is all that you did say? A. Henry Loeb's says, It needs a new bottom you think? and I says, yes, sir.

Q. You never told him what the urgency was for a new bottom? A. No, I did not.

Q. You never told him it was unsafe to use it? A. No, I did not say that it is unsafe to use it—without pressure."

After all this care in examining the boiler, and with full knowledge of its condition, the plaintiff did not think it dangerous. He was asked by his counsel (f. 92):

"Q. State whether or not you knew when you started to make that brew, on the second day of January, 1906, that that boiler was in a dangerous condition? A. Well it did hold the brewings before, the other brewings before, and I thought it would hold this one, too. *I did not expect it would have any explosion on there before it would be fixed.* I watched it close tended to my duty, the way I did all the time."

And again after argument in his hearing on objections to questions which had a tendency to

enlighten him as to what was desired by his counsel, he was finally asked and answered the following question (f. 96):

“Q. State whether or not the statement of Loebs to you that the bottom was ordered for the boiler and that it ought to have been fixed before that and that he only wanted you to use it for one or two more brewings, had anything to do with your using the boiler on the 2nd day of January?  
A. You want me to answer that?”

Q. Yes, sir. A. Well, didn’t have any particular to me—I had no idea that it will explode, because it was holding before and the same time I thought it would hold this time until the bottom gets fixed. That is what I told you before.”

Upon this evidence, which clearly warranted them in so doing, the jury made the following special findings:

“4th. Was the cooker which the plaintiff was using at the time that the accident occurred in such a bad condition and state of repair that a man of ordinary care, prudence and precaution would not have used the same? A. No.

5th. Was the plaintiff sufficiently advised that the cooker was in such a condition that it could not be used with safety pending the time after the order was given for the procurement of the material and repair of the cooker, and the happening of the accident? A. No.

10th. Was the cooker in such a condition to the knowledge of the plaintiff, at the time that he did the brewing that the use of steam in the doing of the brewing was so hazardous, as to prevent an

ordinarily cautious and careful man from using the same? A. No.

13. Did the plaintiff on the 2nd day of January, the day the accident happened have as much knowledge of the condition of the cooker as did the defendant and its agents and officers? A. Yes.

14th. Did the plaintiff have as much knowledge of the condition of the cooker at and before the time of the accident as did the defendant? A. Yes."

The fact that this cooker was unsafe for the purpose for which it was being used, if such fact were established by the evidence, is not alone sufficient to make the defendant liable. If, with the knowledge of its condition, possessed by both the plaintiff and the defendant (and it is not contended that both were not as fully informed as to its condition as a careful inspection could disclose) a reasonably prudent man would have continued to use it, there cannot possibly be any actionable negligence in its use. The jury having expressly found that it was not so defective that a reasonably prudent man would not have used it, the defendant is not legally liable for damages resulting from its use.

To require a greater measure of care than this of the defendant was to require a greater amount than the law imposes upon him.

The discussion under this point does not touch the question of assumed risk and such question is no way affects the conclusion to which the ar-

gument tends. The question of assumed risk does not arise until negligence on the part of the defendant creating that risk is first established.

The risk referred to in the doctrine of "assumed risk" in the law of negligence means, risk of dangers *negligently* produced or permitted by the master.

A promise to change conditions the existence of which is not negligence, gives no right of action if injury results from such condition while the promise remains unfulfilled.

*Sweeney vs. Jones Elevator Co.*, 101 N. Y.  
520.

*Sherman & Redf. Neg. Sec.* 186.

That it is the original negligence of the defendant that is the base of the cause of action and not the promise to repair was directly decided by the Missouri Supreme Court in *Coin vs. Talge*, Lange (o. 222 Mo. 499, and we respectfully refer the Court to the note of authorities appended to the report of that case in 25 L. R. A. (N. S.) 1179 et seq.

See also:

*Andreessie vs. N. J. Tube Co.*, 73 N. J. L.  
664.

*I. & G. N. R. Co. vs. Williams*, 82 Tex. 342.

*Dunkerly vs. Webendorfer Mach. Co.*, 71 N.  
J. L. 60.

*Obenheim vs. Arbuckle*, 80 App. Div. (N. Y.) 465.

*Bodie vs. C. & W. C. R. Co.*, 61 S. C. 468.

*Reiser vs. S. P. M. & L. Co.*, 114 Ky. 1.

The contention of the defendant in error in the court below, which we presume will be repeated here, as we understand it, was substantially this: It appearing that the cooker was somewhat, no matter how slightly, dangerous or defective; the appellee having continued to use it in reliance upon the master's promise to repair; the master, during a reasonable period thereafter, became in the absence of contributory negligence, an insurer of the servant's safety as against the defect complained of; and the fact that the defect was not of such a character that legal negligence could have been predicated thereon in the absence of such promise, is no defense or excuse.

If this be the correct rule, then the action would not be in negligence at all, but on contract for breach of the promise to repair as an element of the employment, a sort of action on an insurance covenant.

This contention was alleged to be supported by *Hough vs. R. R. Co.*, 100 U. S. 224. His counsel quoted extensively from that case, including the following as establishing this rule:

“ ‘If the servant,’ says Mr. Cooley, in his work on Torts, 559, ‘having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good.’ ”

We call the Court's attention to this paragraph from the same opinion:

“To guard against misapplication of these principles, we should say that the corporation is not to be held as guarantying or warranting the absolute safety under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees.”

*U. S. S. C. Rep. Book 25, page 615.*

In the Hough case, the whole opinion proceeded on the assumption that the jury might have found the engine so defective as to constitute neg-

ligence. In no case cited by counsel and in none that we have been able to find, has the rule he invokes been applied to a state of facts where the primary negligence of the master was not either conceded or clearly established.

Defendant also cited *Gowan vs. Harley*, 56 Fed. 973. We think that case well illustrates our contention. The court there constructs the following chain as being necessary to establish liability:

(a) Breach of master's duty to use ordinary care in supplying reasonably safe appliances.

(b) Absence of contributory negligence on part of servant.

(c) The danger must not come within the class covered by the rule delating to assumed risk. But if it does, then the court says:

(d) "To the last rule there is this exception: If a servant who is aware of a defect in the instruments with which he is furnished notifies the master of such defect, and is induced, by the promise of the latter to remedy it, to remain in the service, he does not thereafter assume the risk from such defect until after the master has had a reasonable time to repair it, unless the defect renders the service so imminently dangerous that no prudent person would continue in it. *Hough vs. Railway Co.*, 100 U. S. 213, 225; *Railroad Co. vs. Young*, 49 Fed. 723, I. C. C. A. 428; *Greene vs. Railway Co.*, 31 Minn. 248, 17 N. W. Rep. 378; Rail-



way Co. vs. Watson, 114 Ind. 20, 27, 14 N. E. Rep. 721, and 15 N. E. Rep. 824."

Having thus stated and arranged the essential elements of liability, the opinion continues:

"The first question to be determined under these rules is, was there any evidence in this case that the defendant was guilty of negligence—that he failed in the performance of his duty to provide reasonably safe appliances for the performance of the work required of the plaintiff and his fellow servant?"

The defendant attempted to escape the force of the fourth finding below by claiming that it presented the question as to whether or not the action of the injured man in using the cooker was so reckless and in disregard of his own safety as to bar him from relief.

While such a contention, if supported, might have constituted a defense yet no such defense was pleaded; the only defenses being a denial of negligence, ascertainment of contributory negligence in using the cooker under excessive and unnecessary steam pressure and then the defense of release.

That the cooker was so imminently dangerous that a man using the same would be showing a reckless disregard for his own safety, sufficient to nullify the effect of the promise to repair, is

certainly an affirmative defense which could not be urged unless pleaded. The language of the fourth finding, moreover, is not at all pertinent to present such a condition but merely calls for the jury to answer the question as to the existence or non-existence of the condition constituting negligence in not supplying safe machinery.

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## POINT II.

**It was reversible error to allow leading questions to be put to the plaintiff to elicit evidence that he was induced to use cooker by the promise to repair it and would not have used it otherwise.**

The plaintiff's counsel recognized the fact that his client was fully informed as to the condition of the cooker, and if it was defective he knew accurately the nature and extent of the defect and the danger, if any, attendant upon its use. The evidence fully discloses that this defect was in the nature of a mere crack in a kettle for boiling malt and brewing materials and was not considered dangerous except that when steam pressure was applied the kettle leaked. It was therefore necessary for the plaintiff to relieve himself from assuming the risk of injury by proving that he continued to use the kettle only in reliance upon a promise to repair it. Unless this promise to repair was the procuring or inducing cause of

his continuing to use the cooker he could not be excused from assuming the risk incident to its use. Such is the uniform doctrine applicable to a promise to repair.

*Lewis vs. N. Y. & N. E. R. Co.*, 153 Mass. 73

*S. P. Co. vs. Leash*, 2 Tex. Civ. App. 68.

*Brewer vs. T. C. I. & R. Co.*, 97 Tenn. 615.

*Harris vs. Bottum*, 81 Vt. 346.

*Hollis vs. Widner*, 221 Pa. 72.

*Halloran vs. U. L. & T. Co.*, 133 Mo. 420.

In view of these decisions the crucial nature of the questions bearing upon whether or not the plaintiff did continue in the use of a machine considered by him dangerous, relying upon the promise to repair the same, is manifest. The only testimony on that question was his own. He was asked (f. 92): "Q. State whether or not you knew when you started to make that brew on the second day of January, 1906, that that boiler was in a dangerous condition? A. Well, it did hold the brewings before, the other brewings before, and I thought it would hold this one too. I did not expect it would have any explosion on there before it would ever be fixed. I watched close, attended to my duty the way I did all the time."

After considerable parleying the plaintiff's counsel asked the following question (f. 96): "State whether or not the statement of Loeb's

to you that the bottom was ordered for the boiler and that it ought to have been fixed before that, that he only wanted you to use it for one or two more brewings had anything to do with your using the boiler on the second day of January?" This question was objected to as leading and suggestive and being overruled by the court, the witness said: "Yo want me to answer that." "Q. Yes. A. *We'll didn't have any particular to me. I had no idea that would explode because it was holding before and the same time I thought it would hold this time, too, until the bottom gets fixed. That is I told you before.* Q. Then the fact that he promised to have it fixed didn't have any influence on you at all?" This question being objected to and sustained by the court, plaintiff's counsel made the following statement: "I except and offer to show by the witness in response to this question that he would not have continued to use that boiler but for the promise of Loeb's to have it fixed and except to the refusal of the court to permit me to do it."

It is manifest that this statement of counsel was entirely unnecessary to preserve any exception. The question itself was nothing more than a protest against testimony from his own witness directly the opposite of what he hoped to elicit. The offer to prove and the question could have had but one purpose and that was to acquaint the plaintiff with the kind of testimony

he was desired to give. It was exactly the situation commented on by this Court in *Buckstaff vs. Russell & Co.* 151 U. S. 626 at 636, speaking of offers to prove in plain cases like the one under consideration: "Besides, and this is a consideration of some weight, such a statement in open court and in the presence of the witness would often be the means of leading or instructing him as to the answer desired by the party calling him."

It was not until having been thus admonished, that the witness gave the testimony desired directly contrary to his earlier statement and said (f. 98) in answer to another leading question: "Now state whether or not you used it on that day relying on his promise that he would have it fixed. A. I would not have used it if he would not have fixed it or if he would not have promised to have it fixed." We are aware that the rule is laid down by the text writers and the courts that leading questions are within the discretion of the trial court to permit but every case announcing the rule states the exception that the allowance of such a question, if apparent abuse of discretion, may amount to reversible error.

The judgment of conviction was reversed by the Texas Court of Appeals in *Rangel vs. State*, 22 Tx. App. 642. See also.

*Mathis vs. Ruford*, 17 Tex. 152.

*Tinsley vs. Carey, 26 Tr. 350.*

Mr. Wigmore in his work on Evidence, Sec. 357, states the general rule: "As a general rule a party will not be allowed to put leading questions to his own witness—but this rule is one which yields to the sound discretion of the trial court which discretion will not be reviewed on error or appeal *except in cases of manifest abuse.*"

We respectfully submit in this case, in view of the testimony of the witness who was himself the plaintiff, and the party to profit by his testimony, that the action of the court in allowing these leading questions was a grave abuse of discretion without which there would be no basis to sustain this judgment. It presents a case when if ever a court of errors should not overlook the evil.

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### POINT III.

**There was no credible evidence sufficient to sustain a verdict that the plaintiff continued to use the cooker because of the promise of repair.**

At the close of the evidence for the plaintiff (f. 203) and again at the close of all the evidence (f. 556) the defendant moved for peremptory instructions to return a verdict in his favor both of which motions were denied by the court and the defendant excepted.

The evidence of the plaintiff himself clearly

shows that his solicitude for the repair of the kettle was merely that it leaked and not that he feared any danger to himself. He testifies that he called Loeb's, the superintendent's attention to it nearly a year before the accident happened telling him that it was leaking and that the superintendent replied, "The kettle has been leaking before. It is not so bad," (f. 85) that in a month he called the foreman's attention to it again and was instructed to look it over and see what was the matter. He cut away some woodwork under the kettle and found that the mash or material had been forced through a crack in the bottom through which the light penetrated. He says, "I showed it to Mr. Loeb's. I told him I cannot make no beer that way. He told me—we have to fix it the best way it goes. I asked him if I should put on an iron plate (f. 86) with a piece of packing on top and a bolt through and screw it on tight. He said I should do it. I asked him if I should do that and he said yes." This was done but the kettle still leaked. He called the superintendent's attention to it and testified (f. 87): "He told me I should take it off and put white lead on top of the packing. It might hold then and when the kettle gets hot and the white lead get hot it will tighten itself onto the kettle. I done so and it was all right." This patch was put on in June, 1905.

Then followed the testimony quoted under the preceding point that the witness did not believe the kettle sufficiently dangerous to break.

Taking into consideration that the only evidence given by him that he did use the cooker because of the promises to repair, were practically forced from him by the method of examination pursued, we submit under the authorities cited in the preceding point there was no evidence sufficient to sustain a verdict upon that point.

#### POINT IV.

**It was error for the trial court to refuse to charge that the burden was on the defendant to establish by a preponderance of evidence that he was incompetent to make a binding contract at the time the release was executed.**

The defendant requested the trial court to charge as follows:

#### 19.

"The court instructs the jury that if in the present case you should find from the evidence that the plaintiff on the day that he is alleged to have signed the release offered in evidence was delirious or his mental faculties were otherwise obscured by the injuries from which he was suffering—still this would not necessarily prevent him having sufficient capacity to execute such release. Delirium



or obscuration of the mental faculties by disease or injury must be so complete and so becloud the mind that the person entering into a contract sought to be impeached for want of capacity to make the same, does not understand the nature of the business in which he is engaged and does not understand at the time of executing the instrument, substantially the act, and the extent of his rights and the effect of the instrument upon his rights.

"The jury are further instructed that the burden of showing that the plaintiff's mental faculties were so affected by delirium or were so obscured by the effect of the injury which he has received as to so completely becloud the plaintiff's mind that he did not understand the nature of the business in which he was engaged and the effect of the business in which he was engaged and the effect of the release which he is alleged to have signed, upon his rights, is upon the plaintiff, and unless they believe from the preponderance of the evidence that such a state of facts is established, then they should find a verdict in favor of the defendant."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

20.

"The court instructs the jury, that in all cases involving questions of sanity and insanity *prima facie*, the person is sane, and when there is only evidence suf

ficient to raise a doubt of a person's sanity, the presumption in favor of sanity must prevail. When a instrument is made by a person of competent age, and under no legal disability, it will be taken and held to be valid and binding until incompetency is established, by a preponderance of the evidence."

And the court refused to give the said instruction, to which action of the court the defendant then and there excepted and still excepts.

The execution of the release by the plaintiff who signed it by touching the pen as his mark was made, and the explanation in full of its terms to him was proven by the testimony of the witness Marron, a reputable attorney of this court, whose testimony appears at folios 264 to 265 of the record. It was made in the presence of Leeb, the superintendent, since dead, it was explained to the plaintiff both in English and in his native tongue, German: it was signed by two witnesses, one of whom was produced at the trial and while she could not remember definitely what took place, stated that she was called into the room, introduced to the plaintiff by Mr. Marron and told that she would witness his signature and she signed her name as such witness (f. 554). Dr. Carns, the physician in attendance upon the plaintiff, testified (f. 266) that the plaintiff told him about the release on the next day, "told me that

he had signed a release to the brewery people and what the substance of it was; that they had parted good friends and that they had been good to him and he wanted to still work for them—that he was a brewer and he wanted to work for these people and he liked to work for them and they were good fellows and that he preferred the settlement he had to trying any damage suit.”

The defense to this release as set forth in the reply (1) set up, “this plaintiff alleges that on the 6th day of January, 1906, this plaintiff was as a result of the injuries alleged in the complaint mentally incapable of entering into any contract or of understanding the terms and conditions of said release and this plaintiff denies that he signed said release or authorized any other person to sign the same for him.”

The testimony of the plaintiff was that he remembered nothing and knew nobody from the time of the accident for seven or eight weeks; that he remembered nothing at all that took place at the hospital or who called on him; that he did not remember seeing Mr. Marron on the 6th of January; in short that everything that occurred in that time was a blank (cf. 443 to 445). The issue upon the question of the release therefore was whether or not the plaintiff at the time he signed it had sufficient mental capacity and understanding to know the nature and character of the act and the purpose and effect of the instrument

which was being presented to him. In view of this testimony that everything which took place at the hospital was a blank to him, the statements in regard to what was said and done at the time the release was signed must necessarily be taken as established, it being without contradiction and the question presented was, was the plaintiff in such mental condition as to entirely obscure his faculties. We are brought squarely within the general rule that the burden of proof to avoid a contract upon the ground that the maker had not sufficient understanding to know the nature and consequence of his act rests with the party alleging such incapacity.

The common law rule as to the mental competency of persons is well stated in the early leading case of *Jackson vs. King*, 4 Cow. (N. Y.) 207, as follows: "The rule applicable to such cases is that where the act of a party is sought to be avoided on the ground of mental disability, proof of the fact lies on him who alleges it and, until the contrary appears, sanity is to be presumed. Lord Coke defines *non compos mentis*, to be 'a person who was of good and sound memory and by the visitation of God hath lost it' or 'he that by sickness, grief or other accident wholly loseth his understanding.' (Beverly's case 4 Coke 123, Coke's Lit. 247 a.) The deeds of all such persons are void for the terms '*non compos*' or 'of unsound mind,' are legal terms and import

o total deprivation of sense. It must be shown that the grantor was *non compos* within the legal acceptance of the term; that it was not a partial but an entire loss of the understanding; for the common law seems not to have drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void or how much intellect must remain to uphold it. The difficulty of making such discrimination is apparent. If a man has sufficient capacity to work his farm, or tend his mill skillfully, will the law deny him the right of selling either. I apprehend not. How is the purchaser to protect himself, if the quantum of intellect is the criterion by which to determine whether the contract is valid? He may act with the utmost integrity and yet be in danger; for although it be established that the party with whom he dealt had understanding, deemed sufficient for the provident management of his affairs, by this rule the contract would be void. But weakness of understanding is not, of itself, any objection in law to the validity of a contract. If a man be legally *compos mentis*, he is the disposer of his own property and his will stands for a reason for his action..''

*Jones vs. Jones*, 137 N. Y. 610 at 613.

*Taylor vs. Butterick*, 165 Mass. 547.

*Wyatt vs. Walker*, 44 Ill. 485.

*Artrip vs. Ramake, 96 Va. 277.*

We respectfully refer the Court to a note collecting the cases upon this point which appears in Vol. 36 L. R. A., commencing on page 731 and contains an extensive review of the authorities from which it appears that there is no dissent from the rule as announced.

The Territorial Supreme Court in their opinion fell into error upon this contention and stated that the district court did charge the jury fully giving the requests referred to. The supreme court evidently was referring to a paper contained in the record at folios 42 to 51 purporting to be instructions. What this document was or how it came into the record does not appear. The charge proper as given by the court appears in the bill of exceptions at folios 557 to 564 and the charge as contained in the bill of exceptions is certified by the trial judge to be the charge of the court to the jury (f. 559). It is manifest that the judge's charge has no place in the record proper and it not properly a part of the record. The document appearing in the record and purporting to be the charge cannot be considered by this Court because in no manner authenticated. As this Court said in *Clune vs. The United States*, 159 U. S., at 593: "True there appears in the transcript that which purports to be a copy of the charge marked by the clerk as filed in his office

among the papers in the case but it is well settled that instructions do not in this way become part of the record. They must be incorporated in the bill of exceptions and thus authenticated by the signature of the judge."

"The appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict and the judgment and such other matters as by some statutory or recognized method have been made a part of it \* \* \* in the absence of that or some other statutory provision a bill of exception has been recognized as the only appropriate method of bringing into the record the instructions given or refused."

The New Mexico statute applicable, being Sec. 22, Chap. 57 of the laws of 1907, reads as follows: "*The Record Proper.* All entries, orders and rulings of record in the clerk's office, and all papers regularly filed in a cause with the clerk of the district court shall be considered a part of the record proper." Sec. 25 of the same chapter reads as follows: "All other proceedings taken in the trial of a cause not contemplated by Sec. 22 of this act, and proper and material, shall be made a part of the record by a bill of exceptions to signed, sealed and settled as in this act provided."

## POINT V.

**The court erred in its instruction to the jury on the measure of damages and in refusing the defendant's requested instruction upon that subject.**

The evidence uncontradicted was to the effect that before the injury the earning capacity of the plaintiff was \$20.00 per week, and there is no claim or evidence that it was different or greater at any subsequent time. During all the time the defendant was unable to work the plaintiff paid him twenty dollars per week, and it also paid all his medical, surgical and nursing bills, and these payments of twenty dollars per week were continued until the plaintiff returned to the defendant's employ and subsequently to such return he was raised to twenty-one dollars per week which sum he was paid down to within two months of the trial at which time he voluntarily left the defendant's employ, otherwise he could have earned and received his full earning capacity down to the time of the trial, had he so chosen. He had suffered no other direct pecuniary loss to that time. In this view of the evidence the defendant requested the court to charge the following proposition:

"The court instructs the jury that if they find a verdict in favor of the plaintiff after considering all the evidence and the



instructions of the court, in estimating the damages which plaintiff is entitled to recover, they should confine themselves to such sum as will fairly compensate the plaintiff for physical and mental suffering, if any, caused by the injury, and for any permanent impairment of his capacity to earn money, if any, that may have been caused by and directly resulted from the injury complained of; and their finding should be based upon the evidence in the cause as to each of the elements which the court has instructed you should be considered in arriving at the amount of your verdict.

"In estimating these damages the jury are not at liberty to compensate him for loss of time or expenses, incurred on account of his injury, it appearing from the evidence that he was paid his wages during the time he wasn't working on account of the injury and did not lose any money, and that all his expenses incident to the injury were also paid by the defendant."

The trial court refused to give this instruction and in stead gave the following charge:

"You are instructed that if you find for the plaintiff you should assess his damages at such sum not exceeding twenty-five thousand dollars, the amount claimed in the complaint, as you believe from the evidence will fully compensate him, so far as compensation in money may be made, for the injuries, if any, which he has received, and in assessing

such damages you have a right to take into consideration plaintiff's *loss of time*, with reference to his condition and ability to earn money in his business or calling, his loss from the *impairment*, if any of his *capacity to earn money*, whether such impairment, if any, be temporary or permanent, and also his physical pain, suffering and disfigurement, if any, resulting from such injuries. You may also consider whether or not the evidence satisfies you that the plaintiff is reasonably certain to suffer in the future, as the result of his injuries, further physical pain and is reasonably certain to be physically unable to earn as much money as he was able to earn before the accident and may allow compensation for future physical pain and impairment of his ability to earn money, if the evidence justifies you in believing that the plaintiff is reasonably certain, in the future, to suffer such physical pain and to have his ability to earn money impaired as a direct result of such injuries. From the amount of damages, if any, to which upon the evidence and these instruction you may find the plaintiff is entitled, you should deduct the amount of disbursements by the defendant for the plaintiff, as detailed in the evidence and which the plaintiff expresses his willingness to pay, namely, the sum of "\$910.30."

We submit that under the instruction as given the jury were permitted to give speculative damages for some assumed impaired earning capac-

ity from the time of the injury down to the time of the trial, notwithstanding the fact that the plaintiff had been paid his full wages from the time he was injured in January, 1906, until his return to work in May of that year and that from the time of his returning to work until within two months of the trial, he had been employed in the same capacity and earning a higher rate of wages than before the injury. It permitted the jury to give damages for the two months before the trial when he was voluntarily idle and could have been earning the same wages as before.

The measure of damages for loss of earning capacity is the difference between what was earned before the injury and what he would be able to earn thereafter. *Braithwait vs. Hall*, 168 Mass. 38, and the injured party is required to use all reasonable efforts to reduce the damages.

*IV. Suth. Dam. Sec. 1255.*

If the party has received compensation or wages between the time of the injury and the trial he can recover nothing for loss of such wages.

*IV. Suth. Dam. Sec. 1249.*

*Drinkwater vs. Dinsmore*, 80 N. Y. 390.

*Montgomery vs. Mallett*, 92 Ala. 209.

In this case the plaintiff had been fully com-

compensated for loss of wages or earnings and all other expenses incident to his injury and he was only entitled to recover as past damages, compensation for pain and suffering. Wherever the plaintiff has been able to earn as much since as before the injury, the jury should not consider the item of impairment of earning capacity.

*S. A. & E. Enc. 654.*

*Kane vs. Rd. Co., 95 Ga. 858.*

*M. C. R. Co. vs. Mitten, 13 Tex. C. A. 653.*

*Drinkwater vs. Dinsmore, supra.*

The plaintiff has attempted to distinguish this principle by saying that he was not paid his wages, as wages, but as compensation for a release. We submit that this is no distinction. The terms of the release require the defendant to pay the plaintiff wages while disabled. The plaintiff understood he was receiving wages. His counsel said on the trial (p. 391) "The plaintiff admits on the record that the defendant expended \$910.30 on account of doctor's bills, hospital fees, nurses fees, drugs and *wages* of this plaintiff between these periods about which the testimony had been given."

It is unimportant why or by whom the plaintiff's wages were paid; if he was paid his wages, and it is conceded in this case that he was, then he cannot recover them again. In *Drinkwater*

vs. Dinsmore, *supra*, the wages were not paid by the party causing the injury but the court said: "Before the plaintiff could recover for the loss of wages, he was bound to show that he lost the wages in consequence of the injuries, and how much they were. The defendant had the right to show that that he lost no wages, or that they were not as much as claimed. He had the right to show, if he could, that for some particular reason the plaintiff could not have earned any wages if he had not been injured, or that he was under a contract with his employer that his wages went on without service, or that his employer paid his wages from mere benevolence. In either case, upon such showing, the plaintiff could not claim that the defendant's wrong caused him to lose his wages, and the loss could form no part of his damages."

All the actual damages, loss of time, wages, medical and surgical attention, etc., suffered down to the trial were paid by the defendant in full, before the action.

Pain and suffering alone remained to be compensated for as past damages. Future damages would include, if warranted by the proof, prospective loss of earning capacity, pain and suffering, if any. The fact appeared without contradiction that the plaintiff was employed in the same capacity and at the same or higher wages rate of wages, than before. True, he says he cannot do

the same work, but against his statement is the fact and the testimony of Loebs that he is doing it. He says he cannot work in cold water, but there is no evidence that he ever did or ever would be required to again and nothing to show that this difficulty will not soon disappear. There is no evidence that the ills he complains of, want of sleep, prickling sensation, etc., resulted from the accident. The evidence to justify a recovery of damages for future pain and suffering must be so certain and definite that its existence is not left to the mere imagination or guess work of the jury.

In *Shultz vs. Griffith*, 103 Iowa, 150 (72 N. W. 445), the court said: "True, plaintiff testified to his condition up to and at the time of the trial, but there is no evidence whatever that the condition would continue. Even his attending physician was not asked whether the injuries were such as to cause future pain and anguish. Our conclusion is that the court erred in instructing the jury to consider future pain and anguish in assessing damages."

See also:

*Illinois Iron Co. vs. Helner*, 196 Ill 526.

*Carter vs. Nunda*, 66 N. Y. Sup. 1059.

*VI. Thomp. on Neg.* 2794.

The entire evidence of the plaintiff as it existed at the time of the trial is as follows:

(f. 101)

“Q. To what extent can you work at all, Mr. Schmitt? A. Well, I cannot do any heavy work. I cannot work in the cold storage any more.

Q. Why can you not work in the cold storage? A. Because I have to work in the water and my hands freezing.

Q. Do we understand that your hands are much more sensitive to cold and heat than they were before? A. Well, as soon as I get my hands wet they commence to swell and they commence to crack, and if I do a little work, the blood runs down on my hands.

(f. 102)

Q. Now, have you told the jury all of the effects which you feel from that accident, say at this time? A. Well, I cannot work any more like I ought to, because my hands are stiff. I cannot take hold of anything any more. I cannot hold it tight. Of course I cannot close my hands. My fingers are stiff and generally when the weather changes—my head and my body feels like I have a thousand needles in my hands and commence to pull this way—the cords.

Q. What, if any, difficulty, did you experience about sleeping at night? A. Well, it bothered me a good deal and in the morning generally, when I wake up, mostly my little finger and this one here—they feel like paralyzed.

Q. Well, when these conditions exist, you feel pain? A. Well, yes, sir.

Q. To what extent? A. They feel so much that I cannot sleep much at nights.”

Cross examined concerning his injuries, he testified that he returned to work in the brewery in June, 1906, and continued.

(f. 106)

Q. What were you doing in the brew house; what kind of work? A. Made beer again, as much as I could—I had help with it.

Q. You made beer in this same brew house? A. Yes, sir.

Q. Was it the same kettle? A. The same kettle, yes, sir.

(f. 107)

Q. And you said you had help; what kind of help did you have? A. Mr. Loebs told me I should do as much as I can and if I cannot do the work, he wants to give me men to help me so I can be there, so the work is to be done as it ought to be done, because he knows I am the man for him to do th work right.

(f. 106)

Q. What kind of help did you have? A. The engineer helped me once in a while and the fireman. Those are the only people who was there at the time.

Q. Then no extra men were employed to help you, but you simply called on them to help you, when you wanted them? A. Yes, sir, Mr. Loebs asked me—he told me, if you need help you call on these men over there—they have not much to do..”

(f. 162)

“Q. How long before you quit had you been doing the brewing? A. From the first day on, I commenced again—it was in the middle of June, 1906.

Q. Now, what did the helper amount to that you received, what did they do to help you; how much of it did you receive? A. The heavy work—doing the cleaning and so forth.

Q. Every time you brewed? A. Between the



brewings and after the brewings.

Q. What different help did you have from that which you had before the accident. Did you have help before the accident happened? A. Once in a while, yes, when we was rushing that we had to go through—when we was in a hurry to go through with the work he gave me help.

Q. Did you have any different help since you commenced work in June, 1905, than that which you had before the 2nd day of January, 1908? A. Yes, sir; different help altogether.

Q. What was the difference in it? A. No brewers—just helpers.

Q. What difference in amount—did you have any brewers before the accident happened to help you? A. No, sir.

Q. Did you have any brewers after the accident to help you? A. They would not hire no brewers because they was too poor. They cannot pay it.

Q. Well, you didn't have any, did you? A. What?

Q. Any brewers after you went back to work in June, 1906? A. I didn't have no brewers—no sir—there is no man working there that knows anything about cooking beer.

Q. Had you had just like you had before you were hurt? A. Yes, sir; I had more help.

(f. 153)

Q. You had more help? A. I had help to open the sacks for me, because I could not handle no knife—I cannot handle it yet either—they had no hopper yet.

Q. And help cleaning out? A. They cleaned everything, yes, sir; the first five or six months."

Dr. Carns, who was his physician during his

injury, and who was the only other witness on the point, testified that when he last attended the plaintiff, something more than a year before the trial (f. 220) :

“As far as the usefulness of his hands was concerned, I think he was as good as before the injury—from a cosmetic standpoint, or the looks of it, it looked unsightly, the scars.”

Upon examination of the plaintiff's hands, made during the trial and during said examination, Dr. Carns testified that in his opinion the plaintiff's hands were as good as ever for the purpose of working, being merely scarred, as a result of the burns (f. 221).

This was the only evidence tending to show that plaintiff's injury was or could be permanent or that there would be any future diminution of his capacity to work, as a result of the injury.

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#### POINT VI.

**The judgment should be reversed and the cause remanded to the Supreme Court of New Mexico with instructions to reverse the judgment of the District Court and award a new trial.**

O. N. MARRON,  
FRANCIS E. WOOD,  
Attorneys for Plaintiff in Error.

144  
U.S. SUPREME COURT, D. C.  
FILED.

APR 16 1912

JAMES E. MCKENNEY,  
Clerk.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1911.

*Southwestern Railway and Ice  
Company, et al., Plaintiffs in  
Error,*

No. 55.

*vs.*  
*James Houston, Defendant in Error.*

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BRIEF FOR DEFENDANT IN ERROR.

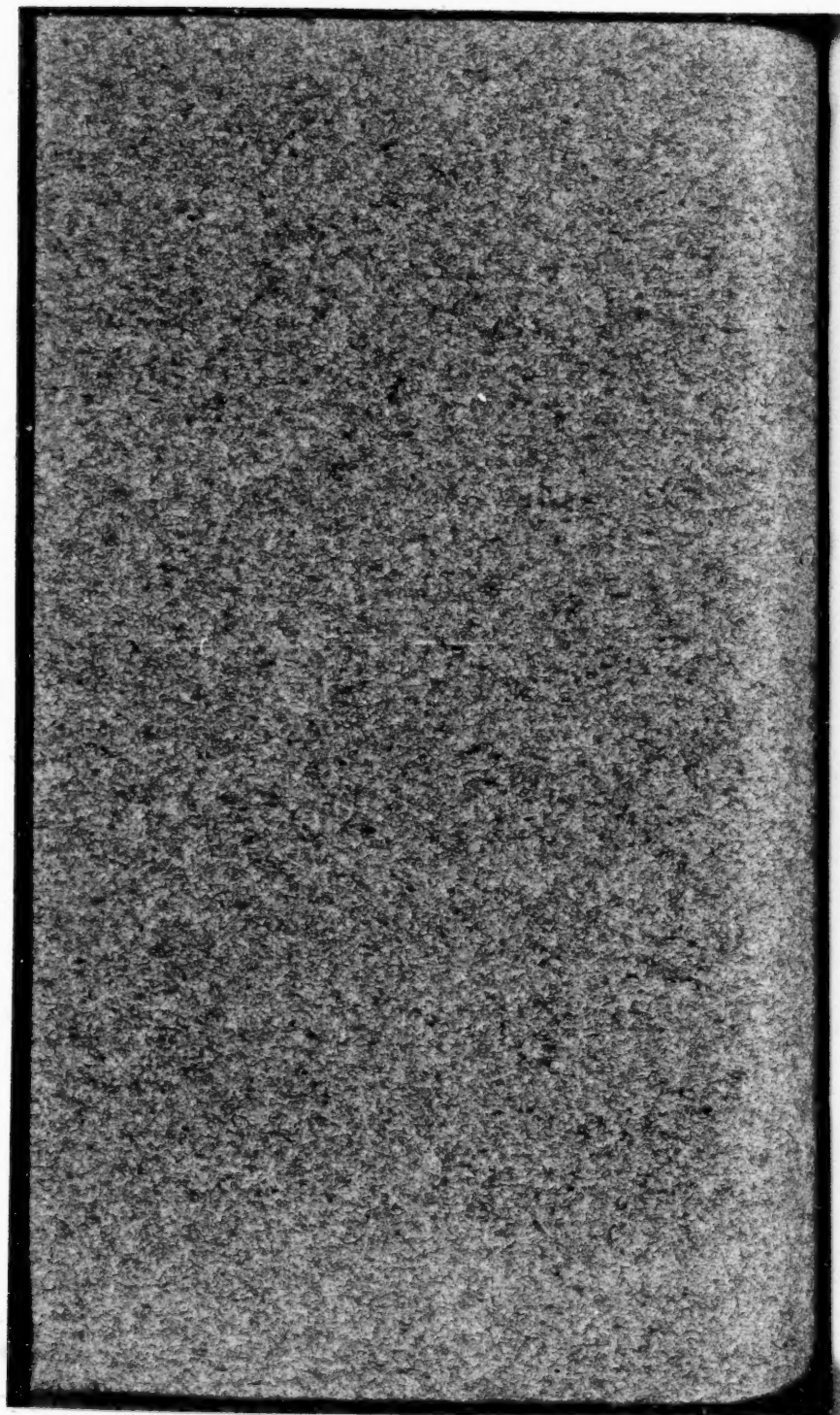
MAKES B. FINE.

Counsel for Defendant in Error.

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ALBRIGHT & ANDERSON, ATTORNEYS, ALBUQUERQUE, N. M.



IN THE SUPREME COURT OF THE  
UNITED STATES.

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October Term, 1911.

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SOUTHWESTERN BREWERY AND ICE  
COMPANY, ET AL., *Plaintiffs in*  
*Error,*

vs.

No. 282.

JOSEPH SCHMITT, *Defendant in Er-*  
*ror.*

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BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

The complaint in this case alleged that on the second day of January, 1906, the plaintiff in error was and for a long time prior thereto had been engaged in the business of conducting and carrying on a brewery for the manufacture of beer at Albuquerque, New Mexico; and that the defendant in error was on said day and for a long time prior thereto had been employed by the plaintiff in error as its servant in the capacity of a brewer; that it was a part of the duty of the defendant in error to cook the mash in a certain cooker then and there owned by the plaintiff in

error and used by it in its said business; and that it was the duty of the plaintiff in error to use reasonable care to furnish and provide for the defendant in error a suitable and safe place in which to do his work, and suitable and safe appliances wherewith to do the same; that on the second day of January, 1906, the plaintiff in error furnished and provided for the use of the defendant in error a cooker which was so out of repair and so unsafe for the purpose for which he was required to use the same that the defendant in error was unwilling to use it on that day; that the plaintiff in error requested him to use it until material which had been ordered for the repair of the cooker should arrive, and promised to repair the same in a very short time; and thereupon, upon the request of the plaintiff in error, and relying upon the promise to repair, the defendant in error consented to use the defective and unsafe cooker, and that while on said day, he was so using the same in the due course of his employment, and was exercising due care for his own safety, the cooker which was filled with boiling mash, gave way and became leaky and ceased to retain its contents, as a safe and sufficient cooker would and should have done, so that a large part of the boiling contents of the cooker was precipitated upon the defendant in error, and he was thereby burned and scalded and rendered unconscious, so that his life was despaired of, so

that he was permanently injured and made incapable of pursuing any kind of labor for a long space of time, and his capacity to labor was permanently impaired, and that he was and still is disfigured, and suffered and still suffers great anguish of body and mind; to the damage of the plaintiff in the sum of twenty-five thousand dollars. (Trans. pp. 1, 2.)

The answer denied categorically and generally the allegations of the complaint and set up a release (a copy of which was attached to the answer) whereby the plaintiff in error was by the defendant in error released from all liability on account or by reason of any negligence alleged in the complaint. (Trans. pp. 4, 5, 6.)

A statute of the Territory of New Mexico in force at the time provided:

“Sec. 2983. When any instrument of writing upon which the action or defense is founded is referred to in the pleadings, the original or a copy thereof shall be filed with the pleading, if within the power or control of the party wishing to use the same, and if such original or a copy thereof be not filed as herein required, or a sufficient reason given for failure to do so, such instrument of writing shall not be admitted in evidence upon the trial.

“Sec. 2984. When a written instrument is referred to in a pleading, and the same or a copy thereof is incorporated in, or attached to such pleading, the gen-

nineness and due execution of such written instrument and of every indorsement thereon shall be deemed admitted, unless in a pleading or writing filed in the cause within the time allowed for pleading, the same be denied under oath: *Provided*, That if the party desiring to controvert the same is, upon reasonable demand, refused an inspection of such instrument, the execution thereof shall not be deemed admitted by failure to deny the same under oath. Such demand must be in writing filed in the cause, and served upon the opposite party or his attorney: *Provided*, That the provisions of this action shall not apply to deeds of conveyance of real estate."

*Compiled Laws of New Mexico, 1897,  
Ch. XII, pp. 770, 771.*

In pursuance of the requirement of this statute, the genuineness and due execution of the release was denied by the defendant in error in a reply which alleged that at the time of the pretended execution of the release he was, as a result of the injuries alleged in the complaint, mentally incapable of entering into any contract. (Trans. p. 7).

By an amended answer interposed at the trial, the defense of contributory negligence was set up, the contributory negligence relied on being "That the said plaintiff against the instruction and direction of the defendant, used the said cooker in



the cooking of the said mash under steam pressure and at a pressure of over ten pounds, and against the direction and instruction of the defendant, turned on steam at a high pressure, to-wit: At a pressure of over ten pounds, for the purpose of cooking said mash at the time the alleged accident occurred, when no pressure for the cooking of said mash was necessary and when any pressure not exceeding ten pounds would have been safe." (Trans. p. 9.)

The amended answer also set up that if any promise to repair the cooker was made, the performance of such promise was unreasonably delayed, and therefore that defendant in error assumed the risk incident to the use of the cooker after the lapse of a reasonable length of time from the making of said promise. (Trans. p. 9.) The allegations of this amended answer were traversed by a reply which also set up that "at the time of the said accident, he was using a pressure of less than ten pounds, and that such pressure was necessary to enable him to cook the said mash and that the mash could not have been cooked without the amount of pressure which the plaintiff was using at the time." (Trans. p. 13.)

Upon the issues thus made, the case was tried by a jury who found a general verdict in favor of defendant in error, and also answered fourteen special interrogatories propounded to them at the instance of the plaintiff in error, as follows:

employe of the defendant company?

No.

13. Did the plaintiff on the second day of January, the day the accident happened, have as much knowledge of the condition of the cooker as did the defendant and its agents and officers?

Yes.

14. Did the plaintiff have as much knowledge of the condition of the cooker at and before the time of the accident as did the defendant?

Yes." (Trans. pp. 342-343.)

In view of these special findings of fact, it is deemed unnecessary to state the evidence adduced in support of the case of defendant in error, but I submit with confidence that the evidence justified and required those findings.

It is argued on behalf of plaintiffs in error that the charge of the court, found on pages 29 to 35 of the transcript, is not properly in the record and that this case must be considered by this Court as if the ninth and eleventh paragraphs of that charge had not been given to the jury. (Brief p. 48.)

In the petition for rehearing to the Supreme Court of New Mexico counsel for plaintiff in error said:

"5. That the court, in the third paragraph of the opinion, while apparently sustaining appellant's contention that the court should have instructed the jury

that the burden of proof was on the plaintiff to show himself incompetent at the time he executed the release of his cause of action, overlooked and misapprehended the facts set forth in the record upon which said contention was based, in that the court states in the opinion that the trial court did instruct the jury, 'That the burden was on the plaintiff to establish such disability;' specifying the tenth and eleventh instructions, as containing that charge. That it appears in the record that there is no instruction numbered eleventh, and that neither in the tenth, nor any other instruction contained in the charge, were the jury instructed that the burden of proof was upon the plaintiff, as suggested in the opinion of the court, and the court must have read the requested instruction which was refused under the misapprehension that it was the instruction given." (Trans. p. 376.)

It will be observed that the suggestion that the charge was not properly a part of the record was not made to the Supreme Court of New Mexico; that the suggestion was that the court must have "read the requested instruction which was refused, under the misapprehension that it was the instruction given." (Ibid.)

The application for rehearing was denied. The opinion of the Supreme Court was allowed to stand as originally written, in which this language was used:

"3. The defendant complains of the refusal of the court to give requested instructions that the burden of proof was on the plaintiff to show himself incompetent at the time he executed a release of his cause of action to the defendant. We fail to understand how such complaint could be made here in view of the tenth and eleventh instructions of the court, which fully and correctly explain the nature of the mental disability necessary to be present in order to avoid the release; and direct *them* that the burden was on the plaintiff to establish such disability." (Trans. pp. 383-384.)

I shall attempt to show that the charge of the court is properly incorporated in the transcript as a part of the record proper; that the bill of exceptions does not purport to give the entire charge of the court, but only the charge of the court to the jury and the exceptions of the defendant thereto; that paragraphs nine and eleven of the charge were not excepted to and were not incorporated in the bill of exceptions for that reason. I shall submit that if the charge of the court had been silent as to the matters contained in the ninth and eleventh paragraphs, such silence would not, in view of the special findings by the jury, have been of the slightest consequence.

It appeared from the evidence that the plaintiff in error paid out in pursuance of the terms of the release relied on \$910.30 (trans. p. 233),

and that the jury, by their verdict, deducted that amount from the damages awarded to the defendant in error. (Trans. p. 35.) It further appeared that on November 20, 1906, the defendant in error, through his counsel, applied to plaintiff in error for a statement of the amounts so paid out, and offered to refund the same at once (trans. p. 350) but plaintiff in error declined to render such statement or to accept the return of the amount so paid. (Ibid. 350, 351.)

The judgment of the trial court having been affirmed by the Supreme Court of New Mexico and the application for a rehearing having been denied, there was filed in the office of the clerk of that court on the fifteenth day of March, 1910, a petition for a writ of error and assignment of errors. (Trans. pp. 377, 378, 379.) This assignment of errors, which was transmitted with the transcript and filed in this Court, is wholly insufficient to require a review by this Court of any of the questions attempted to be presented. Subsequently and very recently, without leave of the court, counsel for plaintiff in error served upon me and have incorporated in their brief an amended assignment of errors. So far as I know no application to the court for leave to file this amended assignment of errors was made, nor was such leave of the court obtained before or after the filing of such amendment. This amended assignment of errors probably sufficiently raises in this

Court some, but not all, of the questions discussed in the brief of plaintiff in error, but I submit to the Court whether or not the rules and practice of this Court sanction this method of procedure.

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### POINTS AND AUTHORITIES.

#### I.

#### THE SPECIAL FINDINGS ARE HARMONIOUS WITH EACH OTHER AND WITH THE GENERAL VERDICT.

The argument adduced by the learned counsel for plaintiffs in error is logically destructive of the principle that the promise of the master to repair a known defect in the appliance furnished to the servant is of any legally efficacy. As I understand the proposition suggested, it is that although the kettle was in a defective condition, it was not so defective that a reasonably prudent man would not have continued to use it. This being so, there was no breach of duty on the part of the master because the master was only bound to use reasonable care to provide a reasonably safe appliance. They therefore consider the fourth finding of fact to be a finding that the master was not guilty of negligence. If this is a sound legal deduction, the unfortunate defendant in error was without recourse in any event, because if the jury had found that the kettle was so defective that a reasonably prudent man would not have continued to use it, then the use of it by

the defendant in error would have constituted contributory negligence which would have precluded a recovery. The argument ignores the eleventh finding, which was that the plaintiff in error did not use ordinary care and precaution in furnishing the cooker and in having it repaired when repairs were needed, and the tenth finding which was that the cooker was not in such condition to the knowledge of the defendant in error at the time that he did the brewing that the use of steam in the doing of the brewing was so hazardous as to prevent an ordinary cautious and careful man from using it.

The entire argument of the learned counsel is well and fully answered by this paragraph of the opinion of the Supreme Court of New Mexico:

“We have, then, a case of defective appliance known to both master and servant; the defective appliance not so palpably dangerous from the defect as that an ordinary prudent, careful and cautious man would refuse to use it; and promise of the master to repair and a request by the master to the servant to use the appliance until repair; a reliance upon the promise of the master to repair by the servant; and injury to the servant by means of the defective appliance. Under such circumstances, it is clear that the master is liable. \* \* \*

“1. Defendant predicates its first contention upon an alleged conflict be-

tween the special findings of the jury of negligence on its part in failure to repair and the special finding that the appliance was not so palpably dangerous as to preclude its use by a reasonably prudent person, and the general verdict for plaintiff. It is perfectly apparent, however, that the contention is unsound and based upon an erroneous view of the law. During the running of the promise to repair a known defect the master's liability is a continuing one and the servant, relying upon the promise, may recover in case of accident resulting from the defect, although obvious, if the claim to damage is otherwise well founded. If the performance of the promise to repair is unreasonably delayed the servant may, under some circumstances, be held to have assumed the risk of the employment, and if the defect renders the service so imminently dangerous that no prudent person would continue in it, the servant is guilty of contributory negligence or has assumed the risk and cannot recover. Thus the master is liable, during the running of his promise to repair a known defect, in all cases unless the servant, either by continuing the service an unreasonable length of time or by the use of the appliance when in an imminently dangerous condition has by his own conduct released the master." (Trans. p. 383.)

The authorities cited by the court in the above paragraph are but a few of the multitude of ad



judications on the subject.

*Hough v. R. R. Co.*, 100 U. S. 213.

*R. R. Co. v. Young*, 49 Fed. 723.

*Gowen v. Harley*, 56 Fed. 973.

*Detroit Crude Oil Co. v. Grable*, 94 Fed. 73.

*Chicago etc. Co. v. Van Dan*, 36 N. E. 1024.

*Breckenridge Co. v. Hicks*, 22 S. W. 554.

*Lutz v. Ry. Co.*, 6 N. M. 496.

*Kane v. Northern Central Ry.*, 128 U. S. 91,  
94.

2 *Bailey, Master & Servant*, Sec. 3073.

*Choctaw etc. Ry. Co. v. McDade*, 191 U. S.  
64.

*Crookston Lbr. Co. v. Boutin*, 149 Fed. 680.

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## II.

### THE SECOND POINT IN BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR IS WITHOUT MERIT.

I submit that the record lends no support whatever to the suggestion of counsel for plaintiff in error that their client was prejudiced by the action of the trial judge with relation to the matters complained of. Counsel are evidently proceeding upon the theory either that this Court may re-examine the facts of this case, or may be influenced by prejudice, and are induced thereby to attack the credibility of the defendant in error and the integrity of his counsel.

An examination of the record will show that on cross examination the defendant in error gave testimony which was quite as damaging as any which was given on the direct examination. The assignment of error number five, the only one relating to this subject, is wholly insufficient to require consideration of this point. The point, as well as point number three, which wholly misconceives the function of this Court, is without merit. This Court has quoted with approval the following language of the Supreme Court of Massachusetts:

"We are not aware of any case in which a new trial has ever been granted for the reason that leading questions, though objected to, have been allowed to be put to a witness."

The matters of which the learned counsel complain in their second and third points, are matters which merely affected the credibility of the witness. The jury saw the witnesses and heard their testimony, and although the defendant in error was contradicted by the testimony of the doctor, the lawyer and the general manager of the plaintiff in error, the jury accepted the testimony of the defendant in error as to all matters of conflict.

*Northern Pac. R. R. Co. v. Urlin*, 158 U. S.  
271.

*Resurrection Gold M. Co. v. Fortune Gold*

*M. Co.*, 129 *Fed.* 668, 684.

*Eli Mining & Land Co. v. Carleton*, 108  
*Fed.* 24.

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III.

THE TRIAL COURT CORRECTLY CHARGED THE JURY WITH REFERENCE TO THE BURDEN OF PROOF, BUT IF THE CHARGE WERE SILENT AS TO THIS, SUCH SILENCE WOULD BE WHOLLY IM-MATERIAL.

In their statement of the case (brief p. 8) and in their argument in support of their point four (*Ibid.* p. 48, 49) counsel for plaintiffs in error insist that this Court must not look at paragraphs nine and eleven of the charge of the court, found on pages 31 and 32 of the transcript. They cite in support of their contention the case of *Clune v. United States*, 159 U. S. 590, and quote from the opinion language which appears to support their contention. I take leave to quote the part omitted from the sentence:

“There are, for instance, in some states, statutes directing that all instructions must be reduced to writing, marked by the judge ‘refused’ or ‘given,’ and attested by his signature, and that when so attested and filed in the clerk’s office they become a part of the record.”

The statutes of New Mexico provide:

"Sec. 2994. Before the argument is concluded either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked and the charge of the court shall be in writing. The court shall instruct the jury as to the law of the case, but shall not comment upon the weight of the evidence.

"Sec. 2995. If the court refuse a written instruction, as demanded, but gives the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as, Changed thus, which words shall themselves indicate that the same was refused as demanded.

"Sec. 2996. The court must read to the jury all the instructions it intends to give and none others, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words, Given, or, Refused, as the case may be, on the margin of each instruction.

"Sec. 2997. If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record.

"Sec. 2998. After argument the court may also, of its own motion, charge the jury. Such charge shall be in writing in consecutively numbered paragraphs,

and no oral explanation thereof shall be allowed; and the provisions of this section shall also apply to the instructions asked by the parties."

*C. L. 1897.*

"Sub-Sec. 128. When the evidence is concluded, and before the cause is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court may, of its own motion, give like instructions in writing, and all instructions shall be given by the court before argument and shall be carried by the jury to their room for their guidance to a correct verdict according to the law and the evidence."

*Code of Civil Procedure, Sub-Sec. 128,  
Sec. 2685.*

"Sec. 26. Making up Bill of Exceptions and Settling Same.—In all cases tried by the court, either with or without the intervention of a jury, the testimony, all rulings of the court, objections made and exceptions taken on the trial shall be taken down by the court stenographer. After such trial any party to the action may require the court stenographer to transcribe the whole or any part of his stenographic notes and when the stenographer shall have transcribed his notes he shall file the same in the office of the

clerk of the court in which the action in which they were taken was tried, and thereupon, either party to said cause desiring to have the same or other matters under Section 25 of this act embodied in a bill of exceptions may give five (5) days notice to the opposite party of his intention of applying to the judge of the court in which said cause was tried, to have the judge of said court sign and seal the same in proper form, as a bill of exceptions. Upon such notice, unless said transcript or other matters tendered shall be shown to be incorrect, and in that case after its correction, the judge or his successors, shall settle, sign and deliver the said transcript as a bill of exceptions, adding thereto such additional matters properly sought to be added. For the purpose of having said bill of exceptions signed and sealed, it shall not be necessary to make out a new copy of the notes of said stenographer or other matters tendered but the same may be referred to and identified as a part of the bill of exceptions; nor shall it be necessary to serve a copy thereof with the notice. *Provided*, That in cases tried without a jury the testimony as transcribed by the stenographer may become a part of the record as provided in Section 24 of this act."

*Laws of 1907, Ch. 57, Sec. 26, p. 112.*

The foregoing statutes were all in force at the time of the trial of this case except insofar as

there was an inconsistency between Section 2994 of the Compiled Laws and Section 128 of the Code of Civil Procedure, the one providing that the instructions shall be given before the argument is concluded, and the other when the evidence is concluded. In the case at bar the transcript shows (p. 342) that the instructions were given, and that the charge of the court was signed by the judge and filed in the clerk's office and officially endorsed by the clerk as filed. (Trans. p. 35.) The charge of the court, found on pages 29 to 35 of the transcript, is a paper which was "regularly filed in a cause with the clerk of the district court," and is therefore, by the letter of the statute invoked by counsel for plaintiff in error, a part of the record proper.

"Neither the instructions nor the requests for instructions in this case, nor the motion for a new trial, are in the bill of exceptions. The last request for instructions (and the request comes after the instructions were given) ends on folio 157 of the transcript. The motion for the new trial in 158 to 169, while the bill of exceptions begins on folio 187 of the transcript. The plaintiffs in error contend that it is not necessary to embody the instructions and motion for the new trial in the bill of exceptions and cites sections 2996, 2997 and 2998 of the Compiled Laws of 1897, in support of such contention. These laws were, how-

ever, passed in 1880, long before the decision in the *Chaves* case, *supra*, and in deciding that case the court held that they did not apply in criminal cases, nor in our opinion do they apply in civil ones; but the plaintiffs in error also claim that under sub-section 172 of the Code of Civil Procedure, passed in 1897 (Ch. 78, Laws of 1897, section 2685, sub-section 172 Compiled Laws of 1897), it is not necessary to have the instructions, and the decisions of the court granting or refusing them and the motion for the new trial, incorporated in the bill of exceptions. Part of said sub-section is as follows: 'In all actions the testimony taken by a referee, the transcribed notes of the stenographer, and all motions, orders or decisions made or entered in the progress of the trial of any action shall become and be a part of the record for the purpose of having the cause reviewed by the supreme court of the territory upon appeal or writ of error, and it will not be necessary to prepare or have settled, signed or sealed any bill of exceptions in order to make any such matters a part of the record in such action.'

"We think that this claim is well founded and that under the Code of Civil Procedure, now in force in this territory, it is not necessary in a civil case to have the instructions and the decision of the court granting or refusing them, and the motion for a new trial, incorporated in the bill of exceptions, but that when they



are in the transcript this court can consider them."

*Schofield v. Territory*, 9 N. M., 526,  
537 538.

The Supreme Court of New Mexico in its opinion said:

"The defendant complains of the refusal of the court to give requested instructions that the burden of proof was on the plaintiff to show himself incompetent at the time he executed a release of his cause of action to the defendant. We fail to understand how such complaint could be made here in view of the tenth and eleventh instructions of the court, which fully and correctly explain the nature of the mental disability necessary to be present in order to avoid the release; and direct *them* that the burden was on the plaintiff to establish such disability." (Trans. pp. 383-384.)

showing that the court declined on the motion for rehearing to modify its opinion, although the motion attempted to point out that there was no instruction number eleven in the record.

It is thus conclusively shown that the Supreme Court of New Mexico considered the ninth and eleventh paragraphs of the charge of the court as properly before it, under the statutes cited.

This presents merely a question of practice

based upon local statutes and procedure, in which this Court habitually follows the local court.

*Sweeney v. Lomme*, 22 Wallace 208.

*Fox v. Haarstick*, 156 U. S. 674.

*Armijo v. Armijo*, 181 U. S. 558.

*Copper Queen Co. v. Bd. of Equalization*,  
206 U. S. 474.

*Lewis v. Harrara*, 208 U. S. 309.

*English v. Arizona*, 214 U. S. 359.

*Santa Fe County v. Coler*, 215 U. S. 296.

Instructions numbers nineteen and twenty asked by plaintiff in error and refused by the court (Trans. pp. 23, 24) were properly refused, because the defendant in error was not seeking to avoid the effect of some act or instrument confessedly done or executed by him upon the ground that he was insane or irresponsible at the time of the doing of the act or execution of the instrument. Defendant in error denied the genuineness and due execution of the release and made the affidavit required by the statute of New Mexico, and thus put the plaintiff in error upon proof of the execution of the instrument relied on. The evidence on behalf of the plaintiff in error tended to show that on the sixth day of January, 1906, four days after the accident, at about three o'clock in the afternoon, Jacob Loebbs, the president of the Southwestern Brewery and Ice Company, and

O. N. Marron, its attorney and a director of the company, visited the defendant in error at the hospital, taking with them the release which had been prepared by Mr. Marron at the instance of Mr. Loebs before they started to the hospital; that the name of the defendant in error was signed to the release by Mr. Marron and that defendant in error touched the pen for the purpose of giving full effect to the signature, with full knowledge of the contents of the paper, and that he was rational and fully capable of understanding, and fully understood what he was doing.

On behalf of the defendant in error the evidence tended to show that he was delirious and irrational for from ten days to two weeks after the accident; that morphine was administered to him to allay pain at the discretion of the nurse or nurses in charge of him; that he was subject to hallucinations and was unable to recognize his wife and members of his family on the very day on which the release purports to have been executed. The release purports to have been executed in the presence of two witnesses, only one of whom was produced and the other of whom was not accounted for. The testimony of the one produced tended strongly to show that the defendant in error did not participate in any manner in the execution of the instrument. Upon this evidence the jury found specially in answer to questions propounded to them:

"1. Was the plaintiff conscious and rational at the time his mark was affixed to the release offered in evidence by the defendant?

No.

2. Was the plaintiff delirious, unconscious or irrational after the accident, and if so, for what period of time?

Yes; about 10 days.

3. Was the plaintiff unconscious, delirious or irrational continuously from the time of the accident until after his mark was affixed to the release offered in evidence by the defendant?

Yes." (Trans. p. 342.)

It is argued that the court should have charged the jury that the burden of proof was upon defendant in error to show that he was insane at the time that Mr. Marron wrote his name to this instrument. I submit that upon the evidence disclosed by this record, no presumption of law or fact as to the sanity of the defendant in error on that occasion arose, and that the charge of the court as contained in paragraph ten, even if this Court feels constrained to ignore paragraphs nine and eleven of the charge, was more favorable to the plaintiff in error than it was entitled to have. I further submit that the trial court in its discretion might have refused to charge the jury as to the burden of proof, and that such refusal would not have constituted error.

*Chicopee Bank v. Philadelphia Bank*, 8  
Wall. 641.

*J. M. Robinson Co. v. Tuscaloosa Mills*, 183  
Fed. 966.

*Union Pac. Ry. Co. v. Harris*, 158 U. S. 326.

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IV.

THE CHARGE AS TO THE MEASURE OF  
DAMAGES WAS CORRECT.

A laborious effort is made by the learned counsel for plaintiff in error in their brief to convince this Court that the charge of the trial court authorized the jury to give the defendant in error "speculative damages for some assumed impaired earning capacity from the time he was injured down to the time of the trial," and it is argued that plaintiff in error paid defendant in error full wages, and therefore the charge should have said nothing about loss of time. It is manifest, however, that the charge of the court is not properly subject to this objection. The Supreme Court of New Mexico in answer to the same argument said:

"The defendant complains of the court's instruction as to the measure of damages and of its refusal to give requested instructions on that subject. It appears that from the time of the action down and to about two months before the trial (when plaintiff voluntarily left the

employ of defendant) defendant paid him the same amounts per month as he had formerly received and even slightly increased the same during part of the time. Defendant presented an instruction expressly excluding from the jury any consideration of loss of wages prior to the trial which, of course, if no other consideration intervened, would be correct. But it appears from a release of his cause of action by plaintiff to defendant, which defendant pleaded and relied upon, that the wages paid him during the time he was actually incapacitated from any labor were paid as a part of the consideration for said release and not as wages. It thus appears that there was loss of time to be compensated by defendant to plaintiff and the instruction given by the court of its own motion, which permitted compensation for loss of time prior to the trial was correct. Counsel for defendant seek to put upon the instruction given by the court a construction which we do not think it will bear and which is to the effect that it authorized the jury to award to the plaintiff damages for loss of time at a rate of wages or compensation different or greater than the plaintiff's earning capacity was shown by the evidence to be. An examination of the instruction, however, shows that the same taken in connection with the evidence, will not bear such a construction." (Trans. p. 384.)

When defendant in error offered to refund the amount paid by plaintiff in error (Trans. p. 350) on account of the release, plaintiff in error replied by letter as follows:

“Albuquerque, N. M., 11-22-'06.

Neil B. Field, Esq.,

Albuquerque, N. Mex.

Dear sir: We are in receipt of your favor of the 20th inst. We are advised by our counsel that the consideration which we paid to Mr. Joseph Schmitt for a release of his cause of action against the Southwestern Brewery & Ice Company was perfectly valid and legal, and that the release executed by him is binding. He having received the consideration for the same and executed the release, we have no claim for a return of the consideration and decline to receive it. Any other expenses that the company may have paid on account of the accident to Mr. Schmitt, the company cheerfully paid as it would do for any of its employes.

Very respectfully,

SOUTHWESTERN BREWERY & ICE Co.,

Per JACOB LOEBS, President.”

(Trans. pp. 350, 351.)

When that letter was written, the position of plaintiff in error was that the payments amounting to \$910.30 (which amount they refused at that time to disclose) were made in consideration of the release of the defendant's cause of action and

not by way of compensation for loss of time and expenses incurred during his illness. Although plaintiff in error was apparently willing to pay to defendant in error increased wages after the accident and before the trial, the jury were not bound to believe that defendant in error would be so fortunate after the trial was over.

Defendant in error testified that his earning capacity was permanently impaired and exhibited his hands to the jury in corroboration of his testimony. Plaintiff in error sought to show that the injuries were trifling, but the jury, whose sole province it was upon the evidence to assess the damages, fixed the amount at \$7,500.00, and by the direction of the court and with the consent of the defendant in error deducted from the damages the sum of \$910.30, the total disbursements of plaintiff in error on account of the alleged release, which the jury found to be invalid. The trial judge upon the motion for new trial, although fully empowered to do so, refused to reduce the amount of the damages, and thereby gave his approval to the verdict.

The charge upon the measure of damages is amply supported by authority.

4 *Suth. Dam., 3d. Ed., Secs. 1241, 1242, 1246, 1251.*

*Chicago & N. W. Co. v. De Clow, 124 Fed. 142.*



*Union Pac. Ry. Co. v. Jones*, 49 Fed. 346.

*Swensen v. Bender*, 114 Fed. 1.

*Kliegel v. Aitken*, 94 Wis. 432.

*Washington etc. Ry. Co. v. Harmon*, 147  
U. S. 571.

*Chicago etc. Ry. Co. v. Lindeman*, 143 Fed.  
946.

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## V.

### THE JURY FOUND SPECIALLY EVERY FACT NECESSARY TO FIX THE LIABIL- ITY OF THE PLAINTIFF IN ERROR.

The learned counsel for plaintiffs in error quote at great length in their brief from the testimony of defendant in error and argue with apparent seriousness the credibility of his statements. The special interrogatories which were submitted to the jury were submitted at the instance of plaintiff in error, and as to each of these interrogatories the answer of the jury supported the testimony of the defendant in error. The answers to these questions establish conclusively for the purposes of this review, every fact necessary to fix liability upon the plaintiff in error, and therefore the effort of counsel to call in question the truth of the testimony of defendant in error must be unavailing.

*Emerson v. Metropolitan Life Co.*, 185  
Mass. 318.

*Germaine v. Muskegon*, 105 Mich., 213.  
*Tesch v. Milwaukee Co.*, 108 Wis. 593.

I respectfully submit that there is no error prejudicial to plaintiffs in error in the record and that the judgment of the Supreme Court of New Mexico should be affirmed.

NEILL B. FIELD,  
Counsel for Defendant in Error.

SOUTHWESTERN BREWERY AND ICE COM-  
PANY *v.* SCHMIDT.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF  
NEW MEXICO.

No. 55. Argued November 14, 15, 1912.—Decided December 2, 1912.

A master may remain liable for a certain time for a failure to use reasonable care in furnishing a safe place for the servant to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise to remove the source of danger. Even if it is open, it will require a strong case to induce the appellate court to review the discretion of the trial court in allowing leading questions; in this case, the witness being a foreigner who seemingly did not understand the English language, there is no ground for revision.

This court will not go behind the decision of the Supreme Court of a Territory upon a matter of local practice in order to reverse the judgment upon a technicality and an assumption contrary to a fact appearing in the record.

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Argument for Plaintiff in Error.

In this case the trial court appears to have properly instructed the jury in regard to damages to which the plaintiff was entitled for personal injury, and did not as to future pain, etc., go beyond conservative rules laid down in such cases.

The court may, within conservative rules, instruct the jury that they may, in estimating the damages of a plaintiff in a personal injury suit, consider loss of time with reference to ability to earn money, temporary or permanent impairment of capacity to earn money, disfigurement and pain, past or reasonably certain to be suffered in the future. See *Chicago, Milwaukee & St. Paul Ry. Co. v. Lindeman*, 143 Fed. Rep. 946.

Where the charge directs that the jury deduct from damages amounts paid under a release executed by plaintiff, if the jury set the release aside it is immaterial what the amounts so paid represented as the transaction was rescinded by the verdict.

15 N. Mex. 232, affirmed.

THE facts, which involve the validity of a verdict for personal injuries, are stated in the opinion.

*Mr. Francis E. Wood*, with whom *Mr. O. N. Marron* was on the brief, for plaintiff in error:

The trial court erred in refusing to grant defendants' motion for judgment in its favor on the special findings of the jury.

This is an action for negligence, not on contract. To maintain it, the first step must be to establish some breach of duty, some actionable negligence on the part of the appellant.

The general verdict for plaintiff is inconsistent with the special finding, and the special finding must prevail. Sec. 2993, Comp. Laws of New Mexico of 1897. This section was examined and approved in *Walker v. Southern Pacific Ry. Co.*, 165 U. S. 593.

The law imposed on the defendant in this case only the obligation to use reasonable and ordinary care and diligence in keeping the cooker in a reasonably safe condition for use. It did not make him an insurer of the condition

of the cooker or of the safety of the plaintiff. 20 A. & E. Enc. 74; Shearman & Redf. on Negligence, § 189, 4th Ed.; *Probst v. Delamater*, 100 N. Y. 272; *Brymer v. Southern Pac. Co.*, 27 Pac. Rep. 371; 26 Cyc. 113-168; Labatt on Master and Servant, § 110; see also *Moore v. Wabash Ry. Co.*, 85 Missouri, 588; *Bailey v. R. W. & O. Ry.*, 139 N. Y. 302.

Plaintiff was entirely familiar with the cooker. He had had charge of it and used it for a year. He understood and appreciated the risk, as well as an ordinarily prudent man could do. He knew the kettle was cracked and leaking in May, 1905, at least seven months before the injury.

The jury having expressly found that it was not so defective that a reasonably prudent man would not have used it, the defendant is not legally liable for damages resulting from its use.

To require a greater measure of care than this of the defendant was to require a greater amount than the law imposes upon him.

A promise to change conditions, the existence of which is not negligence, gives no right of action if injury results from such condition while the promise remains unfulfilled. *Sweeney v. Jones Elevator Co.*, 101 N. Y. 520; Shearman & Redf. on Negligence, § 186.

It is the original negligence of the defendant that is the base of the cause of action and not the promise to repair. *Coin v. Talge*, 222 Missouri, 499, and see note in 25 L. R. A. (N. S.) 1179. See also *Andreacs v. N. J. Tube Co.*, 73 N. J. Law, 664; *I. & G. N. R. Co. v. Williams*, 82 Texas, 342; *Dunkerly v. Webendorfer Mach. Co.*, 71 N. J. Law, 60; *Obanheim v. Arbuckle*, 80 App. Div. 465; *Bodie v. C. & W. C. R. Co.*, 61 S. Car. 468; *Reiser v. S. P. M. & L. Co.*, 114 Kentucky, 1. *Hough v. Railroad Co.*, 100 U. S. 224, and *Gowan v. Harley*, 56 Fed. Rep. 973, cited by defendant in error, do not sustain his contention.

It was reversible error to allow leading questions to be put to the plaintiff to elicit evidence that he was induced to use the cooker by the promise to repair it and would not have used it otherwise. *Lewis v. N. Y. &c. R. Co.*, 153 Massachusetts, 73; *S. P. Co. v. Leash*, 2 Tex. Civ. App. 68; *Brewer v. T. C. I. & R. Co.*, 97 Tennessee, 615; *Harris v. Bottum*, 81 Vermont, 346; *Hollis v. Widner*, 221 Pa. St. 72; *Halloran v. U. L. & T. Co.*, 133 Missouri, 420; Wigmore on Evidence, § 357.

There was no credible evidence sufficient to sustain a verdict that the plaintiff continued to use the cooker because of the promise of repair.

It was error for the trial court to refuse to charge that the burden was on the defendant to establish by a preponderance of evidence that he was incompetent to make a binding contract at the time the release was executed.

Weakness of understanding is not, of itself, any objection in law to the validity of a contract. If a man be legally *compos mentis*, he is the disposer of his own property. *Jones v. Jones*, 137 N. Y. 610, 613; *Taylor v. Butterick*, 165 Massachusetts, 547; *Wyatt v. Walker*, 44 Illinois, 485; *Artrip v. Ramake*, 96 Virginia, 277, and see a note collecting the cases upon this point, 36 L. R. A. 731.

The court erred in its instruction to the jury on the measure of damages and in refusing the defendant's requested instruction upon that subject.

Under the instruction as given the jury were permitted to give speculative damages for some assumed impaired earning capacity from the time of the injury down to the time of the trial.

The measure of damages for loss of earning capacity is the difference between what was earned before the injury and what he would be able to earn thereafter, *Braithwait v. Hall*, 168 Massachusetts, 38, and the injured party is

required to use all reasonable efforts to reduce the damages. 4 Suth. Dam., § 1255.

If the party has received compensation or wages between the time of the injury and the trial he can recover nothing for loss of such wages. *Drinkwater v. Dinsmore*, 80 N. Y. 390; *Montgomery v. Mallett*, 92 Alabama, 209.

In this case the plaintiff had been fully compensated for loss of wages or earnings and all other expenses incident to his injury, and he was only entitled to recover as past damages, compensation for pain and suffering. Wherever the plaintiff has been able to earn as much since as before the injury, the jury should not consider the item of impairment of earning capacity. 8 A. & E. Enc. 654; *Kane v. Rd. Co.*, 95 Georgia, 858; *M. C. R. Co. v. Mitten*, 13 Tex. Civ. App. 653; *Drinkwater v. Dinsmore*, *supra*.

The court erred in instructing the jury to consider future pain and anguish in assessing damages. *Shultz v. Griffith*, 103 Iowa, 150. See also *Illinois Iron Co. v. Helner*, 196 Illinois, 526; *Carter v. Nunda*, 66 N. Y. Supp. 1059; 6 Thomp. on Negligence, 2794.

*Mr. Neill B. Field* for defendant in error:

The special findings are harmonious with each other and with the general verdict.

The master is liable, during the running of his promise to repair a known defect, in all cases unless the servant, either by continuing the service an unreasonable length of time or by the use of the appliance when in an imminently dangerous condition has by his own conduct released the master. *Hough v. R. R. Co.*, 100 U. S. 213; *R. R. Co. v. Young*, 49 Fed. Rep. 723; *Gowen v. Harley*, 56 Fed. Rep. 973; *Detroit Crude Oil Co. v. Grable*, 94 Fed. Rep. 73; *Chicago &c. Co. v. Van Dan*, 36 N. E. Rep. 1024; *Breckenridge Co. v. Hicks*, 22 S. W. Rep. 554; *Lutz v. Ry. Co.*, 6 N. Mex. 496; *Kane v. Northern Central Ry.*, 128 U. S. 91,

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94; 2 Bailey, Master and Servant, § 3073; *Choctaw &c. Ry. Co. v. McDade*, 191 U. S. 64; *Crookston Lbr. Co. v. Boutin*, 149 Fed. Rep. 680.

The trial court correctly charged the jury with reference to the burden of proof, but if the charge were silent as to this, such silence would be wholly immaterial.

In questions of practice based upon local statutes and procedure, this court habitually follows the local court. *Sweeney v. Lomme*, 22 Wall. 208; *Fox v. Haastick*, 156 U. S. 674; *Armijo v. Armijo*, 181 U. S. 558; *Copper Queen Co. v. Bd. of Equalization*, 206 U. S. 474; *Lewis v. Harrara*, 208 U. S. 309; *English v. Arizona*, 214 U. S. 359; *Santa Fe County v. Coler*, 215 U. S. 296.

The charge upon the measure of damages is amply supported by authority. 4 Suth. Dam., 3d Ed., §§ 1241, 1242, 1246, 1251; *Chicago & N. W. Co. v. De Clow*, 124 Fed. Rep. 142; *Union Pac. Ry. Co. v. Jones*, 49 Fed. Rep. 346; *Swenson v. Bender*, 114 Fed. Rep. 1; *Kliegel v. Aitken*, 94 Wisconsin, 432; *Washington &c. Ry. Co. v. Harmon*, 147 U. S. 571; *Chicago &c. Ry. Co. v. Lindeman*, 143 Fed. Rep. 946.

The jury found specially every fact necessary to fix the liability of the plaintiff in error. *Emerson v. Metropolitan Life Co.*, 185 Massachusetts, 318; *Germaine v. Muskegon*, 105 Michigan, 213; *Tesch v. Milwaukee Co.*, 108 Wisconsin, 593.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action by a servant for personal injuries. The declaration alleged that it was the plaintiff's duty to cook brewer's mash in a cooker, that the cooker was so out of repair that the plaintiff was unwilling to use it, but that the defendant requested him to go on until it could be repaired and promised that it should be within a very



short time; that the plaintiff did go on, relying upon the promise, that the cooker gave way and the plaintiff was badly scalded. The defendant denied the allegations and pleaded plaintiff's contributory negligence and a release. In a replication the plaintiff denied his mental capacity at the time the release was made. There was a verdict for the plaintiff subject to special findings which by the law of New Mexico control, *Walker v. New Mexico & Southern Pacific R. R. Co.*, 165 U. S. 593, and the defendant alleged exceptions. These were overruled by the Supreme Court of the Territory and the judgment affirmed.

The first point argued is that the defendant was entitled to judgment on the special findings, because the fourth was that the cooker at the time was not in such a bad condition that a man of ordinary prudence would not have used the same. But the eleventh was that the defendant did not use ordinary care in furnishing the cooker and in having it repaired, and the sixth that the defendant promised the plaintiff that the cooker should be repaired as an inducement for him to continue using it. So it is evident that the fourth finding meant only that the plaintiff was not negligent in remaining at work. Whatever the difficulties may be with the theory of the exception, 1 Labatt, Master and Servant, ch. 22, § 423, it is the well settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed. *Hough v. Texas & Pacific R. R. Co.*, 100 U. S. 213.

Next it is argued that the judgment should be set aside because the court allowed somewhat leading questions to be asked to bring out the plaintiff's reliance upon the defendant's promise. If this matter is open it is enough to say that the plaintiff is a German and seemingly did not

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understand the questions put to him very well, and that it would require a very much stronger case than this to induce an appellate court to revise the discretion of the trial court and grant a new trial upon such a ground. *Northern Pacific R. R. Co. v. Urlin*, 158 U. S. 271, 273. The next point, that there was no credible evidence to sustain the verdict, so far as it does not rest on the preceding one, was for the jury, not for this court.

Fourthly it is argued that the court erred in refusing to instruct the jury that the burden was on the plaintiff to prove his incompetence at the time of making the release. It seems from the record that an instruction to that effect was given but that it was omitted from the bill of exceptions. The Supreme Court of the Territory took notice of the fact, and we certainly should not go behind their decision upon a matter of local practice in order to reverse a judgment upon a technicality and an assumption contrary to the fact. *Santa Fe County v. Coler*, 215 U. S. 296.

Finally it is said that the instructions as to the measure of damages were wrong. The court instructed the jury that they might consider the plaintiff's loss of time with reference to his ability to earn money, the impairment of his capacity to earn money, whether temporary or permanent, disfigurement, and pain, past or reasonably certain to be suffered in the future—and that they should deduct from the amount, if any, the disbursements made under the release which the finding of the jury set aside. It is objected that a part of the disbursements were wages during the plaintiff's disability, but it did not matter whether they were or not if the transaction was rescinded. With regard to future pain &c. the judge did not go beyond the conservative rule laid down in such cases as *Chicago, M. & St. P. Ry. Co. v. Lindeman*, 143 Fed. Rep. 946, 950. The rest of the argument is a discussion of evidence with which we have nothing to do.

*Judgment affirmed.*